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Supreme Court of the United States

OCTOBER TERM, 1948

No. 21

MERREL P. CALLAWAY, AS TRUSTEE OF THE PROPERTY OF CENTRAL OF GEORGIA RAILWAY COMPANY, DEBTOR, ET AL., PETITIONERS,

vs.

L. O. BENTON, JR., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR CERTIORARI FILED FEBRUARY 18, 1948.

CERTIORARI GRANTED MARCH 15, 1948.

SUPREME COURT OF THE UNITED STATES

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[fol. a] [Caption omitted]

[fol. 1]

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF GEORGIA, SAVANNAH DIVISION

In Proceedings for the Reorganization of a Railroad

No. 4829

In the Matter of CENTRAL OF GEORGIA RAILWAY COMPANY, Debtor

PETITION—Filed April 18, 1947

To the Honorable the Judge of the United States District Court for the Southern District of Georgia:

M. P. Callaway, as Trustee of the property of the Debtor, brings this petition against L. O. Benton, Jr., and Charles J. Haden and South Western Railroad Company, and respectfully shows:

1. Central of Georgia Railway Company is the Debtor in the above stated proceeding, which is brought under Section 77 of the Bankruptcy Act, as amended, and in this proceeding a plan of reorganization has been proposed by the Interstate Commerce Commission and approved by the Court, June 24, 1946, under which the South Western Railroad Company is offered $2,200,000 of First Mortgage 4% Bonds, and $1,770,000 of 4½% Income Bonds, of the reorganized Company for the railroads and appurtenances of the South Western Railroad Company, and all the real estate of the Company, and the waiver by it of its claims for equipment and for damages growing out of the rejection of its lease. The method of acquisition by the reorganized Company, whether by sale, merger, or consolidation, is to be determined by the Reorganization Managers to be appointed under said Plan of Reorganization.

[fol. 2] 2. The railroads and appurtenances of the South Western Railroad are leased to the Central of Georgia Railway Company under a lease agreement dated October 17,

1895, for a term of 101 years, renewable upon like terms forever.

3. The Plan of Reorganization of the Debtor was submitted February 11th, 1947 by the Interstate Commerce Commission to the creditors of the Debtor and to the Leased Lines of the Debtor, to-wit: South Western Railroad Company, Chattahoochee & Gulf Railroad Company, and Augusta and Savannah Railroad, to be accepted or rejected by them by ballot not later than March 28, 1947.

4. The Board of Directors of South Western Railroad Company at a meeting held March 13, 1947, authorized the proper officers of the Company to accept said Plan of Reorganization, subject to the assent of the holders of a majority of the capital stock of the Company, at the adjourned annual meeting of the Company, to be held at Macon, Georgia, March 28, 1947.

5. The President of South Western Railroad Company on the authority of the Board of Directors of said Company, wrote a letter to the Stockholders of said Company March 13, 1947, stating that the Board of Directors recommended that the Stockholders assent to the acceptance of said Plan of Reorganization by the Company, and along with said letter the President of South Western Railroad Company, with the authority of the Board of Directors of said Company, mailed to each Stockholder a proxy to be signed by said Stockholders authorizing Anton P. Wright, Wallace Miller, and Herschel V. Jenkins to vote at said meeting of Stockholders to be held on March 28, 1947, for or against the acceptance of said Plan of Reorganization, the said [fol. 3] proposed proxy stating that if the proxy was not marked either for or against the Plan that it would be voted for acceptance of the Plan. Anton P. Wright is President and a Director, Wallace Miller is Vice President and a Director, and Herschel V. Jenkins is a Director of South Western Railroad Company.

6. The meeting of Stockholders of South Western Railroad Company was duly held on March 28, 1947, and at said meeting resolutions were duly passed by the Stockholders assenting to the acceptance by South Western Railroad Company of said Plan of Reorganization, the holders of 30,137 shares of the capital stock of South Western Railroad Company voting in person or by proxy for said resolu-

tions, and the holders of 9,057 shares of the capital stock of said Company voting in person or by proxy against said resolutions. The outstanding capital stock of South Western Railroad Company consists of 51,191 shares of the par value of $100 each.

7. March 28, 1947, South Western Railroad Company, in accordance with the assent of the holders of a majority of the stock of said Company, mailed its ballot to the Interstate Commerce Commission accepting said Plan of Reorganization.

8. March 25, 1947, two stockholders of South Western Railroad Company, L. O. Benton, Jr., who is a resident of Monticello, Jasper County, Georgia, and Charles J. Haden, who is a resident of Atlanta, Fulton County, Georgia, filed their petition in equity in the Superior Court of Bibb County, Georgia, against South Western Railroad Company and the Directors of said Company, in which it is claimed that said Company cannot, under the laws of Georgia under which this Company is incorporated, convey all its railroad property without the unanimous consent [fol. 4] of its Stockholders, and that any such attempted conveyance of all of its railroads without such consent, would be ultra vires of the Corporation. Said petition prayed that the said meeting of the Stockholders to be held March 28, 1947, should be enjoined and that South Western Railroad Company and its Directors should be enjoined from accepting said Plan of Reorganization and conveying its railroads, and from doing and performing any act which might tend to consummate the Plan of Reorganization of the Debtor with respect to the acquisition of the properties of South Western Railroad Company. A copy of said petition is hereto attached marked "Exhibit A".

9. A rule to show cause was issued on said petition and a hearing was had on said rule on March 26th and 27th, 1947. At said hearing the Court declined to enjoin the meeting of Stockholders of South Western Railroad Company, which was to be held on March 28, 1947, or the acceptance of said Plan by South Western Railroad Company, and postponed consideration of the other prayers of the petition, and no further action has as yet been taken by the Superior Court of Bibb County on said petition.

10. This Honorable Court, in which the proceedings for the reorganization of the Debtor under Section 77 of the Bankruptcy Act are pending, has sole and exclusive jurisdiction over said reorganization proceedings and of all matters which affect the confirmation and consummation of the Plan of Reorganization of said Debtor.

11. The South Western Railroad Company is a party to said reorganization proceedings and has actively litigated in said proceedings the fairness and justness of the Plan of Reorganization as it affects South Western Railroad Company, and this Honorable Court has approved the Plan of [fol. 5] Reorganization which was promulgated by the Interstate Commerce Commission and adjudged that it is fair and equitable to South Western Railroad Company.

12, Under the said Plan of Reorganization it is provided that if South Western Railroad Company shall reject the Plan, that the lease of its railroad properties held by the Debtor shall be disaffirmed and the South Western Railroad Company will, thereupon be remitted under the provisions of Section 77 of the Bankruptcy Act to a claim for damages against the Debtor, which claim will be an unsecured claim and treated and classified as such in the reorganization of the Debtor. By whom or under which conditions the railroads of South Western Railroad Company should be operated in that event is a question in which the public has an interest under the provisions of the Interstate Commerce Act, and of which the Interstate Commerce Commission has exclusive jurisdiction. In any event, in that contingency, if operated by the reorganized Company, the railroads of South Western Railroad Company would be operated for its account and at its risk and any loss in operations would be a lien on the property of South Western Railroad Company. Petitioner agrees with the judgment of the Board of Directors of South Western Railroad Company that in the interest of its Stockholders it would be unwise to take such a risk. The Interstate Commerce Commission would probably not approve of the operation of the railroads of South Western Railroad Company by itself, because it has no operating organization and no equipment.

13. The railroads of South Western Railroad Company have been operated for many years by virtue of their lease to the Debtor as a part of the system of railroads operated

by the Debtor and said railroads are an integral and important part of said system.

[fol. 6] 14. The question whether the railroads of South Western Railroad Company shall become a part of the reorganized system of railroads of the Debtor, is a question which is affected with a public interest, as to which the Interstate Commerce Commission has exclusive jurisdiction in the first instance, and of which this Honorable Court has exclusive judicial jurisdiction in connection with the confirmation and consummation of the Plan of Reorganization of the properties of the Debtor.

15. The Interstate Commerce Commission will shortly report to this Court the result of the balloting on the Plan of Reorganization of the Debtor, and the Judge of this Court is then required to confirm or reject the Plan. Under Paragraph (f) of the Bankruptcy Act, it is provided "Upon confirmation of the Plan, the Debtor and any other corporation or corporations organized or to be organized for the purpose of carrying out the Plan, shall have full power and authority to and shall put into effect and carry out the Plan and the orders of the Judge relative thereto, under and subject to the supervision and the control of the Judge, the laws of any State or the decision or order of any Court to the contrary notwithstanding." If, under the statutes of the State of Georgia, the South Western Railroad Company has no power to sell to or merge or consolidate its railroad properties with the reorganized Company, except by unanimous consent of its Stockholders (a legal proposition which Petitioner denies), then and in that event this Honorable Court has plenary power under the provisions of the Bankruptcy Act, to set aside any such alleged law or statute of the State of Georgia, if it interferes with or prevents the process of reorganization of the Debtor, over which this Court has exclusive jurisdiction. It is manifest that unanimous consent of Stockholders could not be secured, and no such impractical consideration should be upheld or allowed to interfere with or defeat the re-
[fol. 7] organization plan in respect of the properties of South Western Railroad Company.

16. The said petition filed by L. O. Benton, Jr., and Charles J. Haden in the Superior Court of Bibb County was filed for the purpose of interfering with and prevent-

ing the Reorganization Plan as it relates to South Western Railroad Company. If these Petitioners, or any other Stockholders of South Western Railroad Company, have any just cause, and cannot get relief within the Corporation and desire to litigate a question which materially affects the Reorganization Plan and the public interest, they should not be permitted to litigate such matters in another Court, but should be required if they desire to litigate such questions, to come into the Court which has exclusive and plenary jurisdiction of such matters.

Wherefore, Petitioner prays (a) that L. O. Benton, Jr., and Charles J. Haden may be perpetually enjoined from further prosecuting their petition in the Superior Court of Bibb County, or any other similar suit, against South Western Railroad Company or its Directors, in the Superior Court of Bibb County, or elsewhere than in this Bankruptcy proceeding, in the United States District Court for the Southern District of Georgia, Savannah Division; (b) that all other Stockholders of South Western Railroad Company shall likewise be perpetually enjoined from bringing or prosecuting any such suit; (c) that a preliminary injunction may be issued in the premises, and that a temporary restraining order may likewise be issued; (d) that an order may be issued calling on the parties hereto, to show cause at a time and place to be fixed by the Court, why perpetual injunction should not be issued in the premises; (e) that a copy of the petition and the order to be passed thereon may be served by Petitioner on South Western Railroad Company by handing a copy thereof, or mailing [fol. 8] the same, to its President or its Counsel, they already being parties to this cause; (f) that appropriate subpoena be served on L. O. Benton, Jr., and Charles J. Haden, (together with this petition and the order to be passed thereon), calling on them to answer this petition within a time to be fixed by the Court; (g) such other and further relief in the premises as may be meet and proper.

T. M. Cunningham, Counsel for Merrel P. Callaway,
Trustee of the Property of the Debtor.

Duly sworn to by Merrel P. Callaway. Jurat omitted in printing.

[File endorsement omitted.]

(Exhibit "A" referred to in Paragraph 8 of the foregoing petition is the copy of the petition of L. O. Benton, Jr., et al. v. South Western Railroad Co., et al., filed in the Superior Court of Bibb County, Georgia, and is included in the transcript of the evidence.)

[fol. 9] IN THE UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT OF T. M. CUNNINGHAM

Before me personally appeared T. M. Cunningham, who on oath says that he is Counsel for Merrel P. Callaway, as Trustee of the Property of the Debtor in the above stated proceeding, and that the petition filed this day in the above stated cause by the said Merrel P. Callaway, as Trustee as aforesaid, against L. O. Benton, Jr., and Charles J. Haden, and South Western Railroad Company, prays for a temporary restraining order against the said Respondents, L. O. Benton, Jr., and Charles J. Haden. Before notice can be served of the application for a temporary restraining order, and before hearing can be had thereon, action may be taken by the said L. O. Benton, Jr., and Charles J. Haden on their petition filed in the Superior Court of Bibb County, which this petition seeks to restrain, and thus irreparable injury, loss or damage will result to the applicant, and the whole purpose of the petition may be defeated thereby.

T. M. Cunningham.

Sworn to and subscribed before me this 18th day of April, 1947. Julian C. Sipple, Notary Public, Chatham County, Georgia. (Seal.)

[fol. 10] IN UNITED STATES DISTRICT COURT

ORDER TO SHOW CAUSE AND TEMPORARY RESTRAINING ORDER—
Filed April 18, 1947

The foregoing petition being presented to the Court, It Is Thereupon Ordered that L. O. Benton, Jr., and Charles

J. Haden, and South Western Railroad Company, the Respondents named in said petition, show cause before me at the United States Court Room in Savannah, Georgia, on the 28th day of April, 1947, at 11 o'clock, A. M., Eastern Standard Time, why a preliminary injunction should not be issued as prayed in the petition.

It Is Further Ordered that, in the meantime and until the further order of this Court, the said L. O. Benton, Jr., and Charles J. Haden, are hereby temporarily restrained from further prosecuting their petition in the Superior Court of Bibb County, Georgia, or from bringing or prosecuting any other similar suit against South Western Railroad Company, or its Directors, in the Superior Court of Bibb County, Georgia, or elsewhere than in this Bankruptcy Proceeding; and all other Stockholders of South Western Railroad Company are likewise, and until the further order of the Court, temporarily restrained and enjoined from bringing any such suit or suits. This temporary restraining order shall expire on April 28, 1947, unless within the time hereby fixed for its expiration it is, for good cause shown, extended for a like period, or unless the parties against whom this temporary restraining order is directed consent that it may be extended for a longer period. The injury sought to be prevented is the further prosecution of the suit of L. O. Benton, Jr., and Charles J. Haden described in the petition, and the prosecution of like suits by other stockholders of South Western Railroad Company, and if this temporary restraining order is not issued action may be taken in the State Court in the very matter which it is the object of this suit to prevent and thus the injury will be irreparable. This temporary restraining order is issued on the attached affidavit of T. M. [fol. 11] Cunningham, Counsel for the Petitioner, in connection with the allegations of the petition.

It Is Further Ordered that a copy of said petition and of this order may be served by Petitioner on South Western Railroad Company by handing a copy thereof or mailing the same to its President or its Counsel, it already being a party to this Cause; and that the South Western Railroad Company shall show cause before me at the United States Court Room in Savannah, Georgia, on the 19th day of May, 1947, why the prayers of said petition should not be granted.

It Is Further Ordered that process shall issue against the Respondents named in the petition, to-wit, L. O. Benton, Jr., and Charles J. Haden, and shall be directed to and returned by the United States Marshals for the Districts in which the service is to be perfected, and shall require the said L. O. Benton, Jr. and Charles J. Haden to answer the petition on or before the 19th day of May, 1947; and a copy of the petition and of this order shall be served with the said process; and the Marshals of the Districts in which the service on the Respondents is perfected shall make return thereof to this Court.

Issued this 18th day of April, 1947, at 12:30 o'clock, P. M., Eastern Standard Time.

F. M. Scarlett, Judge, United States District Court.

[File endorsement omitted.]

[fol. 12] IN THE UNITED STATES DISTRICT COURT

[Title omitted]

MOTION OF L. O. BENTON, JR., TO DISMISS THE PETITION —Filed May 7, 1947

Comes now L. O. Benton, Jr. and moves the Court to dismiss the petition for injunction filed herein by M. P. Callaway, as Trustee of the property of the debtor on April 18, 1947, for the following reasons:

1. This Honorable Court has no jurisdiction over the subject matter of the petition.

2. This Honorable Court has no jurisdiction to entertain this petition against movant, he being a citizen and resident of Jasper County in the Middle District of Georgia.

3. The petition fails to state a claim upon which relief can be granted.

4. The petition seeks the writ of injunction to stay proceedings in the Superior Court of Bibb County, Georgia, a [fol. 13] Court of the State of Georgia in a case where such injunction is not authorized by any law relating to proceedings in bankruptcy.

5. The petition seeks the writ of injunction to stay proceedings in the Superior Court of Bibb County, Georgia, a Court of the State of Georgia, in a case where such injunction is not authorized by any valid act of the Congress of the United States.

6. The proceedings in the Superior Court of Bibb County, Georgia, sought to be enjoined, would not, if permitted to proceed, have the effect of defeating or impairing the jurisdiction of this Honorable Court in the reorganization of Central of Georgia Railway Company.

Wherefore, movant prays that this petition be dismissed.

Charles J. Bloch, Attorney for L. O. Benton, Jr. 614-8 Persons Building, Macon, Ga. Hall & Bloch, of Counsel. Macon, Ga.

[File endorsement omitted.]

[fol. 14] IN UNITED STATES DISTRICT COURT

ANSWER OF SOUTH WESTERN RAILROAD COMPANY—Filed April 22, 1947

Comes now South Western Railroad Company, one of the defendants named in the petition of M. P. Callaway, as Trustee of the Debtor, against L. O. Benton, Charles J. Haden, and this defendant, for a perpetual injunction against the said Benton and Haden, enjoining them from further prosecuting their petition in the Superior Court of Bibb County, Georgia, and answers said petition as follows:

1

This defendant admits the allegations of fact contained in Paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 9, 11, 12, 13, 14, 15, and 16 of plaintiff's petition.

2

This defendant is advised by its counsel that it is not required to answer Paragraph 10 of plaintiff's petition, as this paragraph is but the expression of a legal conclusion of the petitioner.

3

Certain parts of Paragraphs 12 and 15 of the petition are also statements of legal conclusions of the petitioner, which this defendant is advised by its counsel it is not required to answer.

4

Further answering plaintiff's petition, this defendant says that it has, by proper corporate action, as authorized by the laws of Georgia, accepted the provisions of the Inter-[fol. 15] state Commerce Commission's plan of reorganization of the Central of Georgia Railway Company, approved by order of this Court on June 24, 1946, with respect to the acquisition of South Western's railroads by the reorganized company.

And having fully answered the Trustee's petition, this defendant prays that it be hence discharged.

Wallace Miller, Counsel for South Western Railroad Company, Defendant.

Duly sworn to by Wallace Miller. Jurat omitted in printing.

[File endorsement omitted.]

[fol. 16] IN UNITED STATES DISTRICT COURT

RESPONSIVE PLEADING OF L. O. BENTON, JR.—Filed May 14, 1947

Conformed Copy

Comes now L. O. Benton, Jr. and subject to his motion to dismiss hereinbefore filed, responds to the complaint in the case stated as follows:

1. He admits that Central of Georgia Railway Company is the debtor in the proceeding stated, and that a plan of reorganization has been proposed and approved by the Court, June 24, 1946. The exact language of the plan as to Southwestern Railroad Company is:

"Prior to or upon consummation of the plan the debtor shall also acquire, if they can be acquired on the terms

hereinafter set forth, properties at present leased to the debtor by the Southwestern Railroad Company, The Augusta and Savannah Railroad, and the Chattahoochee & Gulf Railroad Company; provided however, that this provision, so far as it concerns the Chattahoochee & Gulf Railroad Company may, in the discretion of the reorganization managers, be disregarded if the reorganized company shall not acquire the railroads of the South Western Railroad Company. If any of these properties shall not be acquired as a result of the acceptance of the plan by the leased line security holders, then and in that event the lease or leases of any line or lines not so acquired shall be disaffirmed as of such time at or prior to the consummation of the plan as the Court may direct. The method of acquisition, whether through purchase, merger or consolidation, shall, subject to the approval of the Commission and the Court, be determined by the trustee or by the reorganization managers when they begin to function."

[fol. 17] "If the leased lines are acquired, the railroads of each of the three and the personal property appurtenant thereto and all of the real estate owned by each lessor shall be conveyed to the reorganized company; each of said lessors shall waive any damages to which it has become or shall become entitled on account of any breach of lease; and the South Western Railroad Company shall waive all claims in respect to equipment. Such conveyances and waivers shall in each instance be on the sole consideration of the delivery to each of the respective lessors of the securities proposed to be allocated to it, as hereinafter specified."

The securities proposed to be allocated to South Western Railroad Company, if the properties could be acquired, were $2,200,000 of First Mortgage 4% Bonds, and $1,770,000 of 4½% bonds.

In the original report of the Interstate Commerce Commission approving the plan, the Interstate Commerce Commission stated:

"Provisions for execution of the plan. (a) Treatment of leased lines.—The properties dealt with in the plan include the properties at present leased to the debtor by the South Western Railroad Company, Augusta & Savannah Railroad, and Chattahoochee & Gulf Railroad Company. It is assumed in this plan that these properties will be acquired in some manner as a result of the acceptance of the plan by

the leased line security holders; but that if the offers are not accepted by any or all of the leased lines, the leases of any such line or lines are to be disaffirmed. The exact method of acquisition, whether through purchase, merger, or consolidation, is not at present determined but, subject to the approval of the Commission and the Court, is left to the [fol. 18] judgment of the trustee or the reorganization managers when they begin to function, in order that it may be accomplished by a method which will be most advantageous to the reorganized company.

"Specifically, it is proposed that the railroads of each of the three leased lines and the personal property appurtenant thereto and all of the real estate owned by each shall be conveyed to the reorganized company; that each of said lessors shall waive any damages to which each lessor has become or shall become entitled to on account of any alleged breach of lease and that the South Western shall waive all claims in respect to equipment, each in consideration of the delivery to it of the new securities proposed to be allocated to it as hereinbefore specified; provided, however, that this proposal as to the Chattahoochee & Gulf Railroad Company shall be subject to withdrawal if the reorganized company shall not acquire the railroads of the South Western.

"Securities offered to the leased lines would not bear interest or dividends for any period prior to acquisition of the respective leased lines.

"If the plan provisions should not be accepted as to any of the leased lines, the lease of such lines or lines, would be disaffirmed as of such time as the District Court determines that the security holders of said line have not consented to the proposals contained in this plan. Thereupon, the remedies which such leased line and its security holders would have would, it is assumed, be limited to (1) the taking back of its property covered by the rejected lease, and (2) the payment of any sums due under the terms of the respective leases as modified from time to time during the receivership and the reorganization proceedings of the [fol. 19] debtor. While such lessor would also have a claim for damages for breach of lease upon disaffirmance in such amount as it might establish before the Court, the debtor trustee believes that no securities or cash would be allocable for the payment of such claim because the same would be considered an unsecured claim similar to the other unse-

cured claims for which no provision is made in this plan."

This Court, in its order of June 24, 1946, determined that South Western Railroad Company was a person interested to whom the plan of reorganization should be submitted for approval or rejection.

The question of whether the properties of South Western Railroad Company could be acquired on the terms set forth is one for determination by the stockholders and officers and directors of said company acting pursuant to law.

2. Paragraph two (2) is admitted.

3. Paragraph three (3) is admitted.

4. Paragraph four (4) is admitted.

5. Paragraph five (5) is admitted.

The letter mentioned in this paragraph was dated March 14, 1947, but this respondent is advised that it was mailed March 13, 1947.

6. The allegations of paragraph six (6) are true. However, this respondent avers that of the 30,137 shares which were permitted by the officers of South Western to vote or be voted in favor of the resolution, 6296 shares were voted by a director of South Western under proxies which had [fol. 20] been solicited by a brokerage firm employed by the management of the debtor. Such proxies, except two, were obtained by said brokerage firm prior to March 13, 1947. As to these 6296 shares, an attorney for this respondent stated at the meeting of March 28, 1947, the following:

"In further elucidation of my position I want to state that it is my information—I don't state it as a fact—I want to state it is my information, those shares were obtained by solicitation of Varnedoe, Chisolm & Co., or their employees, upon the employment of the Central of Georgia Railway Co. I sought at the early part of the meeting to get an opportunity to find out and a resolution to that effect was voted down. Of course, if that is not true, somebody can tell me so now."

Mr. Varnadoe, a member of the said brokerage firm, and Mr. T. M. Cunningham, counsel for the Trustee, were present when this statement was made. It was not denied. On behalf of this respondent and other stockholders, the officers

of the Company were requested to refuse to permit these shares to be voted. The presiding officer refused this request. Your respondent avers that these shares should not have been permitted to be voted. Had that action been taken, the resolution would not have passed.

The presiding officer also permitted the voting of other shares of stock in favor of the resolution when as a matter of law and equity, such shares should not have been voted.

No stockholder personally present at the meeting of March 28, 1947, voted in favor of the resolution save directors of South Western and an agent of the debtor.

[fol. 21] This respondent, among other stockholders, had objected to the holding of this meeting.

This respondent is advised that on March 28, 1947, the officers of South Western Railroad Company mailed its ballot to the Interstate Commerce Commission accepting said Plan of Reorganization. Defendant avers, however, that this action was not the result of any valid or legal assent of the holders of a majority of the stock of said Company.

8. Paragraph eight (8) of the complaint is substantially correct. The petition is exhibited to the complaint in this action and speaks for itself.

9. Answering paragraph nine (9) of the complaint, this respondent says that it is true that a rule to show cause was issued on said petition and a hearing was had on said rule on March 26 and 27th, 1947. After hearing evidence and the argument of counsel on such dates, the Court announced that an order would be passed on March 29th. Subsequently, South Western Railroad Company and some of the individual defendants filed their demurrers and answers. Thereafter, on April 24th, 1947, the Court issued an order, a copy of which is hereto attached and marked Exhibit "A". This order was passed by the Court and the Honorable Mallory C. Atkinson, Judge thereof, on its own initiative without any request therefor by either of the petitioners in said suit or their counsel. No direct bill of exceptions has been certified or filed complaining of the order granting an interlocutory injunction. This respondent is advised that exceptions pendente lite have been certified and filed assigning error on the grant of the interlocutory injunction.

[fol. 22] 10. This respondent says that the allegations of paragraph ten (10) of the complaint are a conclusion of law, and not an allegation of fact which he is required to answer.

He respectfully says, however, that the question of whether or not the properties of South Western Railroad Company can legally be acquired by the reorganized company or the debtor on the terms set forth in the plan by a simple majority vote of the stockholders of South Western Railroad Company is not a question of which this Honorable Court has exclusive jurisdiction.

The plan does not provide that the properties may be acquired by a simple majority vote of the stockholders of the company. Neither does the order of this Court of June 24, 1946.

Whether the properties of this company could be acquired by the debtor or the reorganized company on the terms set forth in the plan was left by the Commission and by this Honorable Court to the stockholders of the company to decide. Whether such acceptance on the part of the company could be based on a vote of the majority of the outstanding stock of the company, was a question as to which this respondent and other stockholders on the one hand, and the officers of the company, on the other hand, differed. That difference was placed before the Superior Court of Bibb County by this respondent by his petition of March 25, 1947, for decision at a time when this Honorable Court had no proceedings before it in which that question could be determined, even if this Honorable Court should have had jurisdiction to decide it.

[fol. 23] The proceedings in the State Court would not have the effect of defeating or impairing the jurisdiction of this Honorable Court in the reorganization proceeding.

11. Answering paragraph eleven (11) of the complaint, this respondent is advised and so responds, that while the South Western Railroad Company is a party to the reorganization proceedings, its appearance therein has been a special appearance for the purpose of urging that its lease should be affirmed without change.

12. The plan of Reorganization with respect to South Western Railroad Company has been quoted and stated in paragraph One (1) of this pleading. The other allegations of paragraph 12 of the complaint are conclusions of law or

of fact, or conjectures which this respondent is not required to answer.

13. The allegations of paragraph 13 of the complaint are substantially correct. From June 19, 1940, to July 1, 1943, the railroads of South Western Railroad Company were not operated by the Debtor under lease, but were operated by the Debtor for the account of South Western.

The South Western Railroad Company owns 331.9 miles of line, including the lines from Macon to Albany, Ga., Fort Valley to Columbus, Ga., Smithville, Ga., to Eufaula, Alabama, Albany, Ga., to Columbia, Ala., Fort Valley to Perry, Ga., Cuthbert, Ga., to Fort Gaines, Ga. Its capital stock is $5,191,000.00. It has no funded debt. The original cost of this property was $12,595,451.00. Value of lands and rights is $1,623,482.00, of which $222,978.00 represents the value of non carrier lands. Cost of reproduction less depreciation of the road is $11,206,415.00.

[fol. 24] 14. The allegations of paragraph 14 constitute a conclusion of law. Even if the allegations are a correct conclusion of law, neither the Interstate Commerce Commission nor this Honorable Court in the plan of reorganization has decided that the railroads of South Western Railroad Company shall become a part of the reorganized system of railroads of the Debtor.

On the contrary that question was in the plan left to be decided by the shareholders of South Western. The plan distinctly provides:

"If any of these properties (including South Western) shall not be acquired as a result of the acceptance of the plan by the leased line security holders (sic), then and in that event the lease or leases of any line or lines not so acquired shall be disaffirmed as of such time at or prior to the consummation of the plan as the Court may direct."

The original report of the Interstate Commerce Commission recognizes that South Western's properties may not be acquired, and recognizes that South Western has the right of severance if it cares to exercise it. The reports also recognize the fact that they, as an incident to proceedings for the reorganization of the Central of Georgia Railway Company, deal with suggestions for the acquisition of South

Western Railroad Company and state that no petition for the reorganization of that company has been filed.

The question whether the railroads of South Western Railroad Company may be acquired by the debtor or the reorganized Company on the terms set forth in the plan was left by the Commission and this Court to be determined by the stockholders of South Western. Whether the offer in [fol. 25] the plan may be accepted by the South Western by a simple majority vote of its stockholders is under its charter and other laws which may be applicable thereto, a question of law which is now being litigated in a proper forum which first assumed jurisdiction of that question. That question can be settled or decided in the State Courts without interfering with the possession or jurisdiction of this Honorable Court.

Until this action was instituted and the restraining order granted, the Trustee, with the approval of this Court and the Commission, had merely made an offer to South Western Railroad Company which it could accept or reject as its stockholders might determine. The stockholders are in dispute as to what constitutes a valid acceptance. This dispute has been laid before a Court of the State of Georgia for determination.

15. Answering paragraph fifteen (15) of the complaint, this respondent avers that he is advised that the Interstate Commerce Commission has now reported to this Court the result of the balloting on the Plan, and that the Judge of this Court will on June 2, 1947, hold a hearing as to whether the Plan will be confirmed or rejected.

The provisions of Section 77 (f) of the Bankruptcy Act are correctly quoted.

The quoted language of the Act does not purport to authorize the Judge to disregard the laws of a State in passing upon the question of whether or not a plan of reorganization should be confirmed.

If the quoted provisions of the Bankruptcy Act should be construed by the Court to authorize the Court to [fol. 26] impair the obligation of the contract which this respondent and other stockholders of the South Western Railroad Company have with the State of Georgia by virtue of the charter of the South Western Railroad Company, such quoted portions would be unconstitutional and void, being contrary to the provisions of the Fifth Amendment

to the Constitution of the United States which provides that: "No person . . . (shall) be deprived of life, liberty or property without due process of law."

16. The allegations of paragraph sixteen (16) of the complaint are denied.

This respondent filed the petition in the Superior Court of Bibb County seeking an orderly determination of the question of whether there could be a valid acceptance of the offer of the Trustee by a simple majority vote of stockholders of South Western under the circumstances stated in the petition.

17. Even if this Honorable Court has the jurisdictional power to grant the injunction prayed (which respondent respectfully denies) the exercise of that power would be discretionary with the Court and ought not to be exercised in this case.

18. The response made by South Western Railroad Company on March 26 and 27, 1947, to the injunction suit filed by respondent in the State Court did not question the jurisdiction of the Superior Court of Bibb County to entertain the suit.

[fol. 27] Wherefore, this respondent prays that the restraining order heretofore granted be dissolved and the injunction prayed refused.

Charles J. Bloch, Ellsworth Hall, Jr., Attorneys for L. O. Benton, Jr.

Hall & Bloch, of Counsel.

Duly sworn to by L. O. Benton, Jr. Jurat omitted in printing.

Exhibit "A" to Responsive Pleading

(Copy.)

Bibb Superior Court

#11037

L. O. Benton, Jr., and Chas. J. Haden

vs.

The South Western Railroad Company, et al.

The within matter coming on to be heard before this Court on March 26th and March 27th, 1947, on response [fol. 28] to rule nisi dated March 25th, 1947, on the question of issuance or denial of interlocutory injunctive relief; after hearing evidence and the argument of counsel on such dates the Court having announced that an order would be passed on March 29th; thereafter on March 29th the Court having deferred passing any such order for an additional one week upon request and agreement of counsel; and thereafter upon informal request acquiesced in by counsel for both the parties hereto the passage of any such order was further deferred; thereafter, to-wit on April 18th, 1947, an injunctive process issued from the District Court of the United States for the Southern District of Georgia restraining and enjoining the petitioners herein from further prosecuting the action in this Court. Now therefore it is considered ordered and adjudged by this Court:

First: Under the facts recited herein, the time of deferring the entry of order having expired, and some of the parties hereto being under restraint and injunction prohibiting any acts on their part prosecuting this action, the Court deems it proper to proceed without any other or further prosecution to pass such order as to this Court seems meet and proper under the circumstances outlined, under the facts and circumstances developed upon the hearing referred to, and after consideration of the authorities cited.

Second. Petitioners seek the injunctive process of this Court on two grounds, viz:

(1) That the contemplated (if not enjoined) action on the part of the defendants would be beyond the charter powers defendant railroad company, and

(2) That such injunctive relief is warranted on account of alleged mismanagement of the corporate affairs by the [fol. 29] defendants' officers and directors. With reference to the second ground this Court holds that there is no evidence of mismanagement on the part of the defendants' officers and directors and the relief sought is on that ground not warranted.

Third. The original charter of the defendant railroad company of itself and without modification or amendment would not permit the action to prevent which injunctive relief is sought. "It is now a well settled principle that a corporation, being a creature of the law, has only the powers conferred upon it by its charter and all others not necessarily implied therefrom are withheld. Its grants, whether or powers or exemptions, are always to be strictly construed and its obligations are to be strictly performed, whether they may be due to the state or to individuals. It seems also to be well settled that a railroad corporation, and it is with such that we are dealing in this case, cannot without special authority of statute alienate its franchise or property acquired under the right of eminent domain or essential to the performance of its duty to the public, whether by sale, mortgage or lease." 101 U. S. 71; 17 How. 30; 21 How. 441; 4 Bliss 35; 10 Allen 448." Singleton vs. South Westren Railroad Co., 70 Ga. 464, 467.

It is argued that the right of contracting for sale or lease as contemplated was granted by the State Legislative Act of 1933, Ga. Code #94-328, which purports to authorize such action by such a corporation upon assent of the holders of a majority of its stock.

The original charter constituted a contract between the State of Georgia the incorporators (or stockholders)—which would include all of the stockholders, and the public, and any act of the legislature of Georgia which would impair [fol. 30] the obligations of that contract would not be effective for that purpose.

Alexander vs. Atlanta & West Point Railroad Company, 108 Ga. 151, 156, 157.

The Trustees of Dartmouth College vs. Woodward 4 Wheat 518; 4 U. S. (L. Ed.) 629.

We are not unmindful of the interests of the public in such a contract and we recognize that the Courts have been properly diligent in the protection of such rights, placing considerable emphasis upon the public good. There has been placed within the jurisdiction of the Interstate Commerce Commission wide jurisdiction, and that commission quite properly gives paramount consideration to the public welfare.

Smith vs. Hoboken R. R. etc. Co., 90 L. Ed. 880.

Thompson vs. Texas Mexican Rwy. Co., 90 L. Ed. 886.

Be that as it may, and without basing this decision on the question of whether or not the contemplated action may or may not to the public interest, we do not consider that the Courts, even in that interest, are prepared to repudiate the principles of law hereinbefore mentioned.

Fourth. It is therefore ordered that the defendants, the officers and directors of the defendant railroad company, be and each and all of said defendants are hereby restrained and enjoined from carrying into effect any provision for the sale or lease of the railroad properties of the defendant railroad company pursuant to any acceptance or purported acceptance of any plan for any such sale or lease not author-
[fol. 31] ized by a unanimous vote of the stockholders of the defendant company; and specifically that such officers and directors be and they are hereby restrained and enjoined from filing with the District Court of the United States for the Southern District of Georgia or with the Interstate Commerce Commission any acceptance of such a plan; and specifically that such officers and directors be and they are hereby restrained and enjoined from selling to such re-organized company as may succeed the Central of Georgia Railway Company and its Receiver, or to anyone else, or to any other company all of the defendant railroad company's railroad properties, rights and franchises; and specifically that such officers and directors be and they are hereby restrained and enjoined from executing any written instrument which might convey the fee simple title to the property just mentioned unto the reorganized company or any other person or company; and specifically that such officers and directors be and they are hereby restrained and enjoined from doing and performing any act in behalf of the defendant railroad company which might tend to consummate the plan of reorganization of the Central of Georgia Railway Company with respect to the acquisition

by that Company of the properties of the South Western Railroad Company.

So ordered this April 24, 1947.

(Signed) Mallory C. Atkinson, Judge Superior Courts, Macon Circuit.

[File endorsement omitted.]

[fol. 32] IN UNITED STATES DISTRICT COURT

AMENDED PETITION OF MERREL P. CALLAWAY, TRUSTEE OF THE DEBTOR VS. L. O. BENTON, JR., AND CHARLES J. HADEN, ET AL., FOR INJUNCTION, ETC.—Filed May 26, 1947

To the Honorable, the Judge of the United States District Court for the Southern District of Georgia:

And Now Comes Merrel P. Callaway, Trustee of the Debtor, Petitioner in the above stated proceeding, against L. O. Benton, Jr., and Charles J. Haden, and, with leave of the Court, amends his petition as follows:

1. After the temporary restraining order was granted on the above stated petition April 18, 1947, Hon. Mallory C. Atkinson, Judge of the Superior Courts of the Macon Circuit, of his own motion, passed on April 24, 1947, a temporary restraining order on the petition of L. O. Benton, Jr., and Charles J. Haden vs. South Western Railroad Company, et al., pending in the Superior Court of Bibb County, (which is in the Macon Circuit), a copy of which temporary restraining order is hereto attached and marked Exhibit "A."

2. The said temporary restraining order is in excess of the jurisdiction of the Superior Court of Bibb County, Georgia, and invades the exclusive jurisdiction of this Court in the Bankruptcy proceedings under which Central of Georgia Railroad Company is being reorganized, and is an attempt to prevent South Western Railroad Company and its Officers and Directors, from accepting the Plan of Reorganization of Central of Georgia Railway Company, and from consummating its acceptance by conveyance of its property, or otherwise, matters over which this Bankruptcy Court has sole and exclusive jurisdiction.

[fol. 33] 3. Charles J. Haden, one of the Petitioners in the above stated suit in Bibb Superior Court, on his own motion, was stricken as a party-plaintiff therein, Petitioner herein, Merrel P. Callaway, as Trustee of the Debtor consenting.

Wherefore, Petitioner Merrel P. Callaway, as Trustee as aforesaid prays:

(a) That this Court will adjudicate the question whether, under the laws of the State of Georgia under the circumstances of this case, unanimous consent of the Stockholders of South Western Railroad Company is a condition precedent to the acceptance of said Plan of Reorganization by South Western Railroad Company, and the consummation of said Plan by the conveyance of its property to the reorganized Company; and that if it is the law of Georgia that unanimous consent of stockholders is necessary in the premises, that this Court, as a Court of Bankruptcy, under the powers conferred on it by the Bankruptcy Acts, and under the relevant provisions of the Interstate Commerce Act, both of which Acts are superior to State laws within their respective domains will declare and decree that under said Acts, in the interest of reorganization and in the interest of the public, that South Western Railroad Company may accept and consummate the said Plan of Reorganization by a conveyance of its property to the reorganized Company, notwithstanding any such law of the State of Georgia, and that any such law is superseded by the provisions of said Federal Acts and is of no force and effect in the premises;

(b) That the order passed April 24, 1947, by the Judge in the suit in the Superior Court of Bibb County (Exhibit "A" hereto) may be annulled and be adjudged to be null [fol. 34] and void, and that if and when the Plan of Reorganization of the Debtor is confirmed, such orders may be passed in the premises as will make effective the acceptance and consummation of said Plan by South Western Railroad Company, its Officers and Directors;

(c) That the name of Charles J. Haden be stricken as a Respondent to the petition filed herein by Merrel P. Callaway as Trustee as aforesaid.

T. M. Cunningham, Counsel for Merrel P. Callaway, Trustee of Central of Georgia Railway.

ORDER ALLOWING AMENDMENT

The foregoing Amendment is allowed, subject to Respondent's Motion to dismiss, this 26th day of May, 1947.

(Sgd.) F. M. Scarlett, Judge, United States District Court.

(The Order of the Judge of the State Court referred to as Exhibit "A" is copied in the transcript of the evidence.)

[File endorsement omitted.]

[fol. 35] IN UNITED STATES DISTRICT COURT

OBJECTIONS OF L. O. BENSON, JR., TO THE ALLOWANCE OF THE AMENDMENT TO THE PETITION—Filed May 19, 1947.

Comes now L. O. Benton, Jr., and objects to the allowance of the amendment to the petition in the matter stated, for the following reasons:

1

Because it fails to state a claim upon which relief can be granted.

2

Because this Honorable Court is without power or jurisdiction to grant the relief therein prayed.

3

Because this Honorable Court is without jurisdiction of the subject matter of the amendment.

4

As to prayer (a) of the amendment, because this Court is without jurisdiction to grant the relief therein prayed.

5

As to paragraph (b) of the prayers of the amendment, because this Court is without jurisdiction to grant the relief therein prayed.

[fol. 36] Wherefore, this defendant prays that these objections be inquired into and the amendment disallowed.

Charles J. Bloch, Ellsworth Hall, Jr., Attorneys for L. O. Benton, Jr. Hall & Bloch, of Counsel.

[File endorsement omitted]

IN UNITED STATES DISTRICT COURT

RESPONSE OF L. O. BENTON, JR., TO PROPOSED AMENDMENT TO THE PETITION—Filed May 19, 1947

Comes now L. O. Benton, Jr., and subject to his objections to the allowance of the amendment herein filed, responds to the amendment as follows:

1

Responding to paragraph one of the amendment, this defendant says that the order passed on April 24, 1947, by the Honorable Mallory C. Atkinson, Judge of the Superior Courts of the Macon Circuit, referred to in said paragraph, and exhibited to the amendment as Exhibit A, was and is not a temporary restraining order, but is an interlocutory injunction.

This order was passed subsequently to a hearing, which hearing was held pursuant to a rule nisi granted by the [fol. 37] said Judge on March 25, 1947, a copy of which is exhibited to the petition in this case.

As has been hereinbefore stated in the response of this defendant to the petition, the defendants have filed in the Superior Court a bill of exceptions pendente lite, certified by the Judge of the Superior Court on May 3, 1947. A copy of this bill of exceptions pendente lite is hereto attached and marked Exhibit A.

In said bill of exceptions pendente lite it is specifically stated that "Thereafter, on April 24, 1947, the Court granted an interlocutory injunction, restraining and enjoining the officers and Directors of the defendant railroad company from carrying into effect any provision for the sale or lease of the railroad properties of the South Western Railroad Company pursuant to an acceptance or purported acceptance of any plan for any such sale or lease not authorized by unanimous vote of the stockholders of the defendant company . . ."

The defendants in the said case in the State Court have filed no other exceptions except those exhibited hereto.

Under the law of Georgia they had a legal right to have filed a direct bill of exceptions, assigning error on the ground of the said interlocutory injunction. They did not do so. Their statutory time, under the laws of Georgia, so to do has expired.

2

Responding to paragraph two of the amendment, this defendant again says that the order referred to was not a temporary restraining order, but an interlocutory injunction. This respondent denies that this injunctive order invades the exclusive jurisdiction of this Court in the bank- [fol. 38] ruptcy proceedings under which the Central of Georgia Railway Company is being reorganized. In the suit in the State Court this respondent simply sought a judicial decree as to whether or not the officers of the South Western Rail Road Company could convey its properties simply by virtue of a mere majority vote of its stockholders, and sought a judicial determination of whether or not that sale could be consummated under the circumstances stated in the petition.

3

Paragraph three of the amendment is admitted.

4

Further answering the amendment, this respondent says:

(a) No petition for a reorganization of the South Western Rail Road Company has been filed with the Interstate Commerce Commission. The matter of the reorganization of the Central of Georgia Railway Company is docketed on the Interstate Commerce Commission as Finance Docket No. 12950. This docket and the reports of the Interstate Commerce Commission in connection therewith are incident to proceedings for the reorganization of the Central of Georgia Railway Company, dealing with suggestions for the reorganization and acquisition of the South Western Rail Road Company.

(b) At the meeting of the stockholders of the South Western Railroad Company, held in Macon, Georgia, on March 28, 1947, pursuant to paragraph fifty-nine of his petition in the Superior Court of Bibb County, Georgia, this defendant sought redress at the hands of the stockholders of the South Western Rail Road Company.

[fol. 39] (c) At the aforesaid meeting of stockholders, he, through his attorney, offered the following resolution:

"Resolved that the stockholders of the South Western Rail Road Company in convention assembled do hereby instruct the officers and Directors of the said Company to take the position that the Act of the General Assembly of Georgia of 1933, page 235, has no application to the South Western Rail Road Company and its stockholders."

(d) This resolution was defeated by a vote of 31,411 shares against it, to 4,615 shares for it.

(e) At the aforesaid meeting of stockholders on March 28, 1947, T. M. Cunningham, Esquire, counsel for the Trustee, petitioner herein, was present, and referring to the plan of reorganization, stated to the stockholders:

"The plan makes an offer to you gentlemen, that is all it does . . ."

(f) The financial condition of the South Western Rail Road Company at December 31, 1946, is shown by its balance sheet as of that date distributed to stockholders March 13, 1947, and is as follows:

"Assets

	December 31, 1946.
Investments:	
Road and Equipment property	$9,523,736.81
Donations and grants	Cr. 3,856.48
Other investments: Bonds	1,096,197.87
Total Investments	$10,616,078.20

[fol. 40] Current Assets:

Cash	211,354.62
Temporary cash investments:	
U. S. Treasury Notes, Tax Series "C"	
Miscellaneous accounts receivable	6,965.60
Interest and dividends receivable	5,921.23
Accrued accounts receivable (Rents)	200,506.88
Other current assets:	
U. S. Treasury, Excess Profits Tax Refund Bonds	
Total Current Assets	424,748.33
Grand Total	$11,040,826.53

Liabilities

December 31, 1946.

Stock:	
Capital stock—common	$5,191,100.00
Current Liabilities:	
Miscellaneous accounts payable:	
Balance due C. of Ga. Ry. Co. for excess cost of real estate purchased to replace real estate sold	201.21
Due C. of Ga. Ry. Co. for cost of additions and betterments assumed under agreement with lessee, dated Sept. 13, 1940	81,475.98
Tax withheld from employees' compensation—due U. S. Government	249.53
Tax withheld on dividends—due U. S. Government	264.00
Dividends matured unpaid	131,394.50
Taxes accrued	2,500.00
Total Current Liabilities	$216,085.22

[fol. 41] Surplus:

Earned surplus—Appropriated:	
(Reserve for tax contingency)	$200,000.00
Earned surplus—Unappropriated:	
(Write up of Invested Capital)	4,247,661.27
(Other earned surplus—Unappropriated)	1,185,980.04
Total Surplus—Unappropriated	5,433,641.31
Total Surplus	5,633,641.31
Grand Total	$11,040,826.53"

Wherefore, this defendant prays that the restraining order heretofore granted be dissolved and injunction refused.

Charles J. Bloch, Ellsworth Hall, Jr., Attorneys for L. O. Benton, Jr., Defendant.

Hall & Bloch, of Counsel.

(The copy of the Bill of Exceptions referred to as Exhibit "A" in the first paragraph of the foregoing is copied in the transcript of evidence.)

[File endorsement omitted.]

[fol. 42] IN UNITED STATES DISTRICT COURT

AMENDMENT OF DEFENDANT, L. O. BENTON, JR., TO HIS RESPONSIVE PLEADING—Filed May 20, 1947

Comes now the defendant, L. O. Benton, Jr., and amends his responsive pleading to the petition for amendment in the case stated as follows:

(1) This defendant has expressly plead that this Honorable Court has no jurisdiction to grant any of the relief prayed in the amendment.

(2) Subject expressly to such plea, this defendant avers that the judgment of the Superior Court of Bibb County,

Georgia, rendered on April 24, 1947, is a correct, legal, and binding judgment. The ruling of the Superior Court of Bibb County, Georgia, therein, which involves the power of a Georgia corporation under the laws of the State of Georgia, is conclusive of Federal Courts.

(3) This defendant says that Sections 94-328 and 94-239 of the Georgia Code of 1933 are not applicable to the South Western Rail Road Company, for the reasons stated in Paragraphs 53, 54, and 55 of his suit in the State Court, a copy of which is exhibited to the plaintiff's petition.

Wherefore, this defendant prays that the restraining order hereinbefore granted be dissolved and the injunction denied.

Charles J. Block, Ellsworth Hall, Jr., Attorneys for L. O. Benton, Jr.

Hall & Block, of Counsel.

[File endorsement omitted.]

[fol. 43] IN UNITED STATES DISTRICT COURT

ORDER CONTINUING TEMPORARY RESTRAINING ORDER UNTIL FURTHER ORDER OF COURT—Filed May 26, 1947

The above stated petition of Merrel P. Callaway, as Trustee of the Debtor, vs. L. O. Benton, Jr., et al., having come on to be heard this day, and evidence having been introduced and the cause having been argued, and in view of the fact that the Court needs some time for consideration of the case, and that the matter of the confirmation of the Plan of Reorganization of the Debtor is set for hearing on June 4, 1947, and the Court does not wish to decide this matter until the hearing has been had on the confirmation of the Plan, It Is, Thereupon, Ordered And Decreed that the temporary restraining order issued in the matter is hereby continued in full force and effect as a temporary injunction until the further order of the Court.

This 26th day of May, 1947.

F. M. Scarlett (F. M. Scarlett), Judge, United States District Court.

[fol. 44] IN UNITED STATES DISTICT COURT

INTERVENTION OF DR. W. G. LEE, I. L. DOMINGOS, GORDON S. CHAPMAN, J. P. ILLGES, JR., AND CHARLES LORIDANS—Filed June 24, 1947

To the Honorable the District Court of the United States for the Southern District of Georgia, and the Honorable F. M. Scarlett, Judge thereof:

The intervention of Dr. W. G. Lee, I. L. Domingos, Gordon S. Chapman, J. P. Illges, Jr., and Charles Loridans, respectfully shows to the Court:

1

Your Intervener, Dr. W. G. Lee, is the owner of 120 shares of stock in the South Western Rail Road Company, standing in his own name. His wife Mrs. Anna Weaver Lee, owns 4 shares; and the Alexander School Board, of which he is a Trustee, owns 200 shares.

2

Your intervener, I. L. Domingos, owns 30 shares of stock in said Company, and his wife, Mrs. Alice B. Domingos, 73 shares.

3

Your intervener, Gordon S. Chapman, owns 364 shares; his wife, Mrs. Molly P. Chapman owns 100 shares; and the Washington County Fair Association, of which he is a Trustee, owns 100 shares.

4

Your intervener, J. P. Illges, Jr., is Secretary of Illges Security Company, a corporation, which owns 100 shares. He is also President and Treasurer of Riverview Securities [fol. 45] Company, which owns 150 shares. His sister, Mrs. Dorothy I. Mayher, owns 15 shares.

5

Your intervener, Charles Loridans, owns 100 shares and Southern Ferro Concrete Company, which is a personal holding corporation for him, owns 200 shares.

6

Shortly after the stockholders' meeting of the South Western Rail Road Company, held on March 28, 1947, there was formed a Stockholders' Protective Committee, of which your interveners together with L. O. Benton, Jr. have been elected as the Executive Committee. Shareholders of the South Western Rail Road Company, owning more than 5,000 shares of the stock of the South Western Rail Road Company, are members of said Stockholders' Protective Committee, and your interveners file this intervention individually, representing the shares of stock hereinbefore listed specifically, and also in their capacity as members of the Executive Committee of the Stockholders' Protective Committee of the South Western Rail Road Company.

7

Your interveners had anticipated joining in the suit of L. O. Benton, Jr., and Charles J. Haden, against the officers of the South Western Rail Road Company and its Directors, and the South Western Rail Road Company, pending in the Superior Court of Bibb County, Georgia, a copy of which is exhibited to the plaintiff's petition in this case. However, they were prevented from so doing by the injunctive order of this Honorable Court, and are also prevented by said injunctive order from filing any new suit [fol. 46] in the State Court, asserting the same position as that maintained by the said L. O. Benton, Jr.

8

Had they been permitted to do so, they would have joined L. O. Benton, Jr., as plaintiffs in the said State Court suit, and joined in the prayers of the said petition.

9

They now desire to intervene in the case stated in support of the position of L. O. Benton, Jr., therein.

Wherefore, they pray an order of the Court, granting this intervention for the purpose herein stated.

Charles J. Bloch, Ellsworth Hall, Jr., Attorneys for Interveners; Hall & Bloch, of Counsel.

IN UNITED STATES DISTRICT COURT

ORDER TO SHOW CAUSE—Filed June 24, 1947.

The foregoing intervention and its prayer have been considered.

It is ordered that M. P. Callaway, as Trustee of the Central of Georgia Railway Company, show cause before me at Savannah, Georgia, at 10 o'clock, A. M., June 30, 1947, [fol. 47] why the prayer of the intervention should not be granted and the intervention allowed.

This 19th day of June, 1947.

F. M. Scarlett, United States Judge.

IN UNITED STATES DISTRICT COURT

ORDER ALLOWING INTERVENTION—Filed June 24, 1947

It now appearing to the Court that counsel for M. P. Callaway, as Trustee, has stated that he has no objection to the allowance of the within intervention and there being no necessity, therefore, for a hearing on June 30, 1947.

It is now Ordered that the intervention be and it is hereby allowed.

This 23 day of June, 1947.

F. M. Scarlett, United States Judge.

[fol. 48] IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF GEORGIA; SAVANNAH DIVISION

No. 4829

In Proceedings for the Reorganization of a Railroad

In the Matter of CENTRAL OF GEORGIA RAILWAY COMPANY, Debtor

Petition of MERREL P. CALLAWAY, Trustee, vs. L. O. BENTON, JR., ET AL

Findings of Fact and Conclusions of Law on the Above Stated Petition—Filed August 15, 1947

STATEMENT OF THE CASE

1. March 25, 1947, L. O. Benton, Jr., and Charles J. Haden, as Stockholders of South Western Railroad Company (here-

inafter called "South Western"), brought a petition in Equity in behalf of themselves and others similarly situated who cared to intervene, against South Western and its Directors in the Superior Court of Bibb County, Georgia, to enjoin the Defendants from holding a meeting of stockholders of South Western, which was scheduled to be held March 28, 1947, and from submitting to them the proposed plan to sell the railroad properties of South Western, in pursuant of the Reorganization Plan (hereinafter called the "Plan") of Central of Georgia Railway Company (hereinafter called "Central"), and if the Court should not enjoin the Stockholders' meeting and a mere majority of stockholders should vote in favor of the acceptance of said Plan, then the prayer of the petition is that the Defendants should [fol. 49] be enjoined, from carrying into effect such action of the Stockholders, from accepting the Plan, from selling the railroad property of South Western, and from doing anything to consummate said Plan with respect to the acquision of the railroads of South Western.

2. A rule was issued on the above stated petition against the Defendants to show cause on March 26, 1947, why the Defendants should not be enjoined as prayed. The rule was argued March 26th and 27th, 1947, and the Court reserved his decision.

3. March 28, 1947, the Stockholders of South Western held their meeting and a majority of the Capital Stock was voted in favor of the acceptance of the Plan, and South Western on March 28, 1947, sent its ballot to Interstate Commerce Commission, signifying South Western's acceptance of the Plan.

4. April 18, 1947, Merrel P. Callaway, as Trustee of the property of Central, filed a summary petition in this proceeding against L. O. Benton, Jr., and Charles J. Haden, to enjoin them from prosecuting their suit in the State Court and South Western was made a party to this petition. On this petition the Court issued a temporary restraining order against L. O. Benton, Jr., and Charles J. Haden, restraining them from prosecuting their suit in the Superior Court of Bibb County or elsewhere than in this Court, and also restraining all other stockholders from prosecuting similar suits elsewhere than in this proceeding; and at the same time this Court issued a rule to show cause why a

permanent injunction should not issue, which rule was returnable May 26, 1947.

5. April 24, 1947, the Judge of the Superior Court of Bibb County, Georgia, of his own motion, issued an interlocutory [fol. 50] injunction against the Defendants in the State Court suit. He overruled the charges of mismanagement made against the Defendants, and put his grant of the injunction on the ground that South Western had no charter power to sell its railroad, without unanimous consent of its stockholders. The injustice part of the Court's order is copied in the footnote.[1]

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[1] "It is therefore ordered that the defendants, the officers and directors of the defendant railroad company, be and each and all of said defendants are hereby restrained and enjoined from carrying into effect any provision for the sale or lease of the railroad properties of the defendant railroad company pursuant to any acceptance or purported acceptance of any plan for any such sale or lease not authorized by a unanimous vote of the stockholders of the defendant company; and specifically that such officers and directors be and they are hereby restrained and enjoined from filing with the District Court of the United States for the Southern District of Georgia, or with the Interstate Commerce Commission any acceptance of such a plan; and specifically that such officers and directors be and they are hereby restrained and enjoined from selling to such reorganized company as may succeed the Central of Georgia Railway Company and its Receiver, or to anyone else, or to any other company, all of the defendant railroad company's railroad properties, rights and franchises; and specifically that such officers and directors be and they are hereby restrained and enjoined from executing any written instrument which might convey the fee simple title to the property just mentioned unto the reorganized company or any other person or company; and specifically that such officers and directors be and they are hereby restrained and enjoined from doing and performing any act in behalf of the defendant railroad company which might tend to consummate the plan of reorganization of the Central of Georgia Railway Company with respect to the acquisition by that company of the properties of the South Western Railroad Company."

6. Merrel P. Callaway, as Trustee, amended his petition by bringing to the attention of this Court the injunction ordered by the Superior Court of Bibb County, and by striking Charles J. Haden as one of the Respondents, his name having been stricken as Plaintiff in the State Court suit at his instance. In this amended petition the Petitioner prayed that this Court would adjudicate the question, whether under the laws of Georgia and the circumstances of this case, unanimous consent of the stockholders of South Western is a condition precedent to the acceptance of said Plan by [fol. 51] South Western and the consummation of the Plan by the conveyance of its property to the reorganized Company, and further prayed that the order of the Superior Court of Bibb County may be annulled and declared void, and that when the Plan is confirmed by the Court that such order may be passed as will make effective the acceptance and consummation of the Plan by South Western.

7. The case was heard on May 26, 1947, evidence was introduced at the hearing, and the case was argued orally and by briefs.

8. Dr. W. G. Lee, I. L. Domingos, Gordon S. Chapman, J. P. Illges, Jr., and Charles Loridans, all stockholders of South Western, have intervened in this Court in support of the position of L. O. Benton, Jr.

CONTENTIONS OF THE PARTIES

1. L. O. Benton, Jr., and Charles J. Haden contended in their Bill filed in the State Court:

(a) That the Directors and Stockholders of South Western had repeatedly voted to reject the offer made to the South Western in the Plan, and that the Directors suddenly changed their views at a meeting of the Directors held on March 13, 1947, and advised the stockholders to accept the plan at a meeting of stockholders to be held on March 28, 1947. But the time was too short for the stockholders to adequately inform themselves on the subject and to intelligently make up their minds.

(b) That the South Western Railroad Company was incorporated under an Act of the General Assembly of Georgia in the year 1845, and that no power was conferred [fol. 52] in the Act, or in the amendments thereof, to sell the railroad property of South Western, and that, there-

fore, the South Western could not sell its property without the unanimous consent of its stockholders.

(c) That the South Western was proceeding to sell its railroad under the provisions of Sections 94-328 and 94-329 of the Georgia Code of 1933, which are copied in the footnote.[2]

(d) That the South Western had never accepted Code Sections 94-328 and 94-329 as a part of its charter, and that the said sections were not intended by the General Assembly to apply to the South Western.

(e) That if said Code Sections should be construed to be applicable to the present situation of the South Western, the said sections as so applied would be unconstitutional and void as being in conflict with the provisions in both the Federal Constitution and the State Constitution against impairment of the obligation of contracts.

(f) That the Code Sections 94-328 and 94-329 are not applicable to South Western, because (1) the lease under which the properties of the South Western are being operated has not terminated; (2) the terms proposed for the [fol. 53] sale of the property were not agreed upon by the Board of Directors, but were forced upon them; (3) the phrase "another railroad corporation" in said sections means a presently existing operating railroad corporation and not one hereafter to be formed; (4) the sections con-

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[2] "94-328. AUTHORITY TO SELL OR LEASE RAILROAD. Any railroad corporation organized under the laws of this State, which has heretofore leased its property for a long term of years to another corporation, which lease has terminated, and the lessor is not a going concern or equipped to conduct the operations of a railroad company, is hereby authorized to sell or lease its property, rights, and franchises to another railroad corporation upon such terms as may be agreed upon by the board of directors of the selling or lessor corporation and assented to by the holders of a majority of its stock. (Acts 1933, p. 235.)"

"94-329. RIGHTS ACQUIRED. The railroad corporation to which a sale or lease is made under the terms of the preceding section shall acquire all the property, rights, and franchises of the selling, or lessor, corporation. (Acts 1933, p. 235.)"

template the assent or agreement of all the members of the Board of Directors and not merely a majority thereof. Two Directors were absent from the meeting of March 13, 1947, at which the directors resolved to recommend the acceptance of the Plan to the stockholders.

(g) That the Sections were not intended by the General Assembly of Georgia to apply to the South Western; were not intended by the Legislature to amend the charter of the South Western; and, if so intended, have not been accepted as a part of the charter by the stockholders of the South Western.

2. L. O. Benton, Jr., moved to dismiss the petition of Merrel P. Callaway, as Trustee, on the following grounds:

(a) This Court had no jurisdiction over the subject-matter.

(b) This Court had no jurisdiction to entertain the petition against L. O. Benton, Jr., because he was a citizen and resident of Jasper County in the Middle District of Georgia.

(c) The petition fails to state a claim upon which relief can be granted.

(d) The proceedings in the Superior Court of Bibb County could not be enjoined because such injunction is not [fol. 54] authorized by any law relating to proceedings in bankruptcy.

(e) Such an injunction is not authorized by any valid Act of the Congress of the United States.

(f) The proceedings in the Superior Court of Bibb County would not, if permitted to proceed, have the effect of defeating or impairing the jurisdiction of this Court in the reorganization of the Central.

L. O. Benton, Jr., further contended that the Bankruptcy Court had no exclusive jurisdiction over the subject matter and no prior jurisdiction, and that he could not have proceeded elsewhere than in the Superior Court of Bibb County to have his rights in the premises adjudicated.

L. O. Benton, Jr., further contended that the judgment of the Superior Court of Bibb County, Georgia, rendered on April 24, 1947, was a correct, legal, and binding judgment and that it, involving the power of a Georgia corpora-

tion under the laws of Georgia, is conclusive on Federal Courts.

L. O. Benton, Jr., further contended that the question whether the railroads of South Western Railroad Company might be acquired by the debtor or the reorganized Company on the terms set forth in the plan, was left by the Commission and the District Court to be determined by the stockholders of South Western. Whether the offer in the plan might be accepted by the South Western by a simple majority vote of its stockholders was, under its charter and other laws which may be applicable thereto, a question of law which was being litigated in a proper forum which first assumed jurisdiction of that question. [fol. 55] That question can be settled or decided in the State Courts without interference with the position or jurisdiction of the District Court. Until an action in the District Court was instituted and a restraining order granted, the Trustee, with the approval of the Federal Court and the Commission, had merely made an offer to South Western which it could accept or reject, as its stockholders might determine. The stockholders were in dispute as to what constituted a valid acceptance. That dispute had been laid before a Court of the State of Georgia for determination.

L. O. Benton, Jr., further contended that even if the District Court had the jurisdiction to grant the injunction prayed, the exercise of that power would be discretionary with the Court and ought not be exercised in this case.

L. O. Benton, Jr., contended that in the suit in the State Court, he simply sought a judicial decree as to whether or not the officers of the South Western could convey its properties by virtue of a mere majority vote of its stockholders, and sought a judicial determination of whether or not that sale could be consummated under the circumstances stated in the petition in the State Court.

L. O. Benton, Jr., objected to the amendment of Merrel P. Callaway, as Trustee, to his petition in the Federal Court, which amendment is hereinbefore referred to in Paragraph 6 of the "Statement of the Case," on the following grounds:

(a) Because it failed to state a claim upon which relief could be granted;

[fol. 56] (b) Because the District Court was without power or jurisdiction to grant the relief therein prayed, and was without jurisdiction of the subject matter thereof.

3. Merrel P. Callaway, as Trustee of the property of the Central, contended:

(a) That the railroad properties of South Western were in possession of the Bankruptcy Court, and that the South Western was a party to the reorganization proceedings.

(b) That under the Plan it was proposed that the South Western should be consolidated with or merged into or sold to the reorganized Company, in consideration of the allotment of certain securities to be issued under the Plan.

(c) That under the powers conferred on the Interstate Commerce Commission under the Interstate Commerce Act, and on the Court under Section 77 of the Bankruptcy Act, exclusive power was conferred on the Bankruptcy Court and the Commission to determine on what conditions a conveyance of the property of South Western should be made to the reorganized Company, in consummation of the reorganization plan of the Central, and that, therefore, the Commission and the Court had jurisdiction, exclusive of the State Court, over the subject matter of the State Court suit.

(d) That if there was any law or decision of the State of Georgia, which prevented the South Western Railroad Company from conveying its property, except by unanimous consent of its stockholders, both the Commission and [fol. 57] the Bankruptcy Court had the power in the reorganization of the Central of Georgia Railway Company to set aside any such law or decision of the State of Georgia.

(e) That the Bankruptcy Court had prior jurisdiction by reason of its possession of the property of South Western, by reason of the fact that South Western was a party to the reorganization proceeding, and that the question of the terms on which it might convey its property was a matter over which the Bankruptcy Court and the Commission had prior jurisdiction by virtue of the reorganization proceedings.

(f) That the Bankruptcy Court, having both exclusive and prior jurisdiction, had the right and power to enjoin the proceedings in the State Court, and that it was a proper occasion for the exercise of the power, and that injunction

under such circumstances was not only not prohibited by Federal law, but was exclusively authorized under Federal law and commonly exercised.

(g) That Code Sections 94-328 and 94-329 were not amendments to the charter of the South Western Railroad and did not need to be accepted by the South Western Railroad; that these Code Sections were general laws of the State of Georgia and applicable to the South Western Railroad, and that under these Code sections the South Western Railroad had the power to convey its railroads on the consent of a majority of its stockholders.

(h) That the Central, or any other Company authorized under the law of Georgia as the reorganized Company, has the power to purchase the South Western under Sections 94-318 of the Code of Georgia of 1933, which is copied in [fol. 58] the footnote,[3] and that under this Statute a vote of the majority of the stockholders is sufficient.

(i) That there is no law or decision of the State of Georgia which would prevent the South Western Railroad from conveying its railroad property without the unanimous consent of its stockholders.

(j) That in the exigencies which confront the South Western, the South Western clearly has the power to sell

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[3] Code Section 94-318. "Any railroad Company incorporated under the provisions of this title shall have authority to sell, lease, assign or transfer its stock, property and franchises to, or to consolidate the same with those of any other railroad company incorporated under the laws of this or any other state or of the United States, whose railroad within or without the state shall connect with or form a continuous line with the railroad incorporated under the law, under such terms as may be agreed upon; and conversely any such corporation organized under the provisions of this title may purchase, lease, consolidate with, absorb and merge into itself the stock, property and franchises of any other railroad company incorporated under the laws of this or any other state or the United States, whose railroad within or without this state shall connect with and form a continuous line or system with the railroad of such company incorporated under this title upon such terms as may be agreed upon."

its property to the new reorganized Company without the unanimous consent of its stockholders and petitioner invokes the decision of the Court on this question.

4. South Western and three of its Directors demurred to the petition in the State Court on the grounds that the petition set forth no cause of action against them and that there was no equity in the petition. South Western and the same three Directors answered the petition and contended that South Western had power and authority under Section 94-328 of the Code of Georgia to accept the plan and convey its railroad to the reorganized Company on the assent of a majority of its stockholders, and challenged the contentions that the contract clauses of the Federal and State [fol. 59] Constitutions were applicable to the case. South Western and its three Directors filed exceptions pendente lite to the injunctive order of the Superior Court of Bibb County of April 24, 1947, on the grounds that said order was invalid and unlawful, in holding that unanimous consent of its stockholders was necessary to a sale of its property, because South Western had power and authority to sell its property on the assent of a majority of its stockholders under Code Section 94-328; and South Western further attacked said order on the ground that it was beyond the jurisdiction of the State Court, in that the United States Court for the Southern District of Georgia had exclusive and paramount jurisdiction over the reorganization of the Central, that South Western was a party to said reorganization proceedings, that the acquisition of South Western is a material part of the plan, and that the said order of the State Court will defeat and prevent the plan as it relates to South Western.

Findings of Fact

1. L. O. Benton, Jr., is a stockholder of South Western (and has been since 1932), and resides at Monticello, Georgia, in the Middle District of Georgia.

Intervener Dr. W. G. Lee is the owner of 120 shares, his wife, the owner of 4 shares, and the Alexander School Board, of which is a Trustee, the owner of 200 shares: Intervener I. L. Domingos owns 30 shares of South Western, and his wife 75 shares. Intervener Gordon S. Chapman owns 364 shares, his wife 100 shares and the Washington County Fair Association, of which he is a Trustee, 100

shares. Intervener J. P. Illges, Jr., is Secretary of Illges Security Company, a corporation, which owns 100 shares. He is also President and Treasurer of Riverview Securities Company, which owns 150 shares. His sister, Mrs. Dorothy L. Mayher, owns 15 shares. Intervener Charles Loridans [fol. 60] owns 100 shares and Southern Ferro Concrete Company, which is a personal holding corporation for him, owns 200 shares.

Shortly after the stockholders' meeting of the South Western, held March 28, 1947, there was formed the Stockholders Protective Committee, of which Interveners and L. O. Benton, Jr., are the Executive Committee. There are shareholders of South Western owning more than 5,000 shares, who are members of said Stockholders Protective Committee, and the intervention mentioned in paragraph 8 of the "Statement of the Case" was filed by the Interveners individually and as members of said Executive Committee.

2. South Western Railroad Company is a railroad corporation originally incorporated under an Act of the General Assembly of Georgia, approved December 27, 1845, (Acts 1845, p. 132). There have been several amendments of the charter of South Western Railroad Company prior to the General Railroad Incorporation Law of the State enacted in 1892. All these amendments were Acts of the General Assembly of Georgia. There have been no amendments to the Charter since the passage of the General Railroad Incorporation Law of the State. There is no provision in the original charter of the South Western or, in any amendments thereof, which gives the Company any power to sell its railroad properties. The charter is silent with respect thereto. The principal office and place of business of the Company is in Bibb County, Georgia. The capital stock of this Company consists of 51,911 shares of the par value of $100.00 each, all of which is common stock. It has no mortgages, or other liens, and no funded debt. 1,440 shares of its capital stock are owned by Central of Georgia Railway Company, and pledged under the Consolidated Mortgage of [fol. 61] the Central. Its railroad mileage is about 331 miles, and its railroads lie generally between the Georgia lines and the Alabama lines of the Central system.

3. June 24, 1869, South Western leased its railroads and their appurtenances to the Central Railroad and Banking Company of Georgia, for and during the entire continuance

of the corporate existence of the South Western under its present charter, or under any amendments, or extensions thereof. The minimum rental was 7% on the stock of South Western, plus corporate expenses and taxes.

4. The properties of Central Railroad and Banking Company of Georgia were liquidated through receivership and purchased, for the most part, by Central of Georgia Railway Company, and the said leasehold estate of Central Railroad and Banking Company of Georgia, in and to said South Western under the lease above mentioned, by force of and under judicial proceedings, passed to and became vested in Central of Georgia Railway Company. October 17, 1895, the original lease was renewed and modified for the term of 101 years, renewable in like periods upon the same terms forever, the rental being 5% on the capital stock of the lessor, plus taxes and organization expenses.

5. December 19, 1932, a Receiver was appointed for the property of Central of Georgia Railway Company by the United States District Court for the Southern District of Georgia. The Receiver adopted the lease of South Western and operated the South Western Railroad as a part of its system of railroads. June 19, 1940, Central of Georgia Railway Company filed its petition in the District Court of the United States for the Southern District of Georgia, stating that it was unable to meet its debts as they matured, and [fol. 62] that it desired to file a plan of reorganization under the provisions of Section 77 of the Federal Bankruptcy Act. Thereupon, Trustees in Bankruptcy were appointed by said Court for the properties of Central of Georgia Railway Company, and Petitioner Merrel P. Callaway, is now the sole Trustee of the property of Central of Georgia Railway Company in said Bankruptcy proceedings.

6. The Trustees of the property of the Central entered into a contract, with South Western, to adopt the lease of October 17, 1895, on a modified basis, whereby the Trustees agreed to pay in lieu of rental the net income of the leased property, and to guarantee South Western against losses and expenditures for additions and betterments in excess of $50,000 per annum. This contract was terminated July 1, 1943, and thereafter the Trustee adopted the South Western lease for the duration of the Bankruptcy.

7. The railroads of South Western have been continuously, since 1869, operated under said leases as a part of the system of railroads of the Central and its predecessor, Central Railroad and Banking Company of Georgia; and the railroads of South Western have been in the possession of the Trustees in Bankruptcy of the Central since June 19, 1940, and have been operated by them since June 19, 1940, as hereinbefore stated.

8. The plan of reorganization of the Central was promulgated by the Interstate Commerce Commission, and was approved by the Court June 24, 1946.

The Plan allots to South Western $2,200,000 of First Mortgage 4%, Series "A", Bonds of the reorganized Company and $1,770,000 of 4½% Income Bonds, Series "B", of the reorganized Company.

[fol. 63] The Plan provides with respect to the Leased Lines of the Central as follows:

"The term 'reorganized company' as used herein refers to the corporation which shall issue the new securities provided for in the plan, whether the debtor or a new corporation. The reorganization managers may determine whether a new corporation shall be organized or the new securities shall be issued by the debtor. Upon consummation of the plan, the reorganized company shall have title to all the property and assets of the debtor, provided that this shall not be construed as prohibiting the rejection of any lease.

"Prior to or upon consummation of the plan the debtor shall also acquire, if they can be acquired on the terms hereinafter set forth, properties as present leased to the debtor by the South Western Railroad Company, The Augusta and Savannah Railroad, and the Chattahoochee & Gulf Railroad Company; provided, however, that this provision, so far as it concerns the Chattahoochee & Gulf Railroad Company may, in the discretion of the reorganization managers, be disregarded if the reorganized company shall not acquire the railroads of the South Western Railroad Company. If any of these properties shall not be acquired as a result of the acceptance of the plan by the leased-line security holders, then and in that event the lease or leases of any line or lines not so acquired shall be disaffirmed as of such time at or prior to the consummation

of the plan as the Court may direct. The method of acquisition, whether through purchase, merger, or consolidation, shall, subject to the approval of the Commission and the Court, be determined by the trustee or by the reorganization managers when they begin to function.

[fol. 64] —"If the leased lines are acquired, the railroads of each of the three and the personal property appurtenant thereto and all of the real estate owned by each lessor shall be conveyed to the reorganized company; each of said lessors shall waive any damages to which it has become or shall become entitled on account of any breach of lease; and the South Western Railroad Company shall waive all claims in respect to equipment. Such conveyances and waivers shall in each instance be on the sole consideration of the delivery to each of the respective lessors of the securities proposed to be allocated to it, as hereinafter specified.

"Securities allocated to the leased lines shall not bear interest or dividends for any period prior to acquisition of the respective leased line."

"That nothing herein contained shall be, or be construed as, a grant of authority for the issue of any securities, assumption of obligations, transfer of any property, sale, consolidation, or merger of the debtor's property, or pooling of traffic, pursuant to either the Bankruptcy Act or the Interstate Commerce Act, until further action by this Commission upon confirmation of the plan by the Court."

The Interstate Commerce Commission, in the last sentence of its Report on the Plan, states: "We find that the Plan herein approved would be compatible with the public interest."

The Commission on page 1 of the Summary of its Report on the Plan of July 13, 1945, stated:

"As does the Debtor Trustee's Plan, the Plan approved makes provision * * * for consolidation, merger or pur-
[fol. 65] chase of transportation properties of Lessors in lieu of continued operation under leases, if the leased properties can be acquired on the terms set forth in the Plan. Two of the Lessors have not indicated consent to the consolidation, and have asked that the existing leases be continued in effect after reorganization. The third has asked for a higher valuation of its properties."

9. South Western appeared specially in the reorganization proceedings and asked that its lease be adopted by the reorganized Company without change. All through the proceedings it has litigated the allotment made to it in the Plan. It contested the Segregation Formula for the separation of earnings and expenses as between the mortgaged and leased lines of the Debtor. If attacked the Severance Study introduced in evidence on the hearing of the reorganization plan. It has filed a claim for equipment which is yet undetermined. It filed a petition for a declaratory judgment as to its rights, in the event its lease was rejected, which petition was refused by the Court on the ground that this was a matter within the exclusive jurisdiction of the Commission.

South Western Railroad Company is solvent, and no Bankruptcy proceedings under Section 77 of the Bankruptcy Act have been instituted by or against it.

10. The allotment made by the Plan to the South Western was the same allotment which was proposed by the Trustee of the Debtor in the Reorganization Plan submitted by him. The allotment was contested by the mortgage Trustees as too high. The Commission decided with respect to the allotment to the South Western "The proposals of the mortgage Trustees appear too low, those of the Lessor appear unreasonably high, and those of the Debtor Trustee appear fair and equitable and to equal the value of the transportation property, and are approved." This allot-[fol. 66] ment was approved by this Court in its approval June 24, 1946, of the Plan, and there was no appeal from this judgment of the Court.

11. April 24, 1947, the Judge of the Superior Court of Bibb County, Georgia, of his own motion, issued an interlocutory injunction against the defendants in the State Court suit. He overruled the charges of mismanagement made against the defendants, and put his grant of the injunction on the ground that South Western had no charter power to sell its railroad, without unanimous consent of its Stockholders. The injunctive part of the order is copied in footnote 1 to paragraph 5 of the "Statement of the Case," supra.

12. February 11, 1947, the Interstate Commerce Commission submitted the plan to the creditors and leased lines

for their acceptance or rejection on or before midnight March 28, 1947. The Plan was not submitted by the Commission to the stockholders of the South Western Railroad for their acceptance or rejection. It was submitted to the Company.

13. March 13, 1947, the Directors of the South Western met, a quorum being present but two of the Directors being absent, and resolved that the Plan be accepted, subject to the assent of said acceptance by the holders of a majority of South Western Railroad Company stock; and it was further resolved that when it has been determined that a majority of the holders of South Western Railroad stock has assented to the acceptance of the Plan of Reorganization of the Central, the proper officers of this Company are authorized and directed, in carrying out the approved plan of reorganization, to sell to the reorganized Company all of the South Western Railroad properties (including its real estate, but excluding cash and securities in its treasury), [fol. 67] rights and franchises, as authorized by Section 94-328 of the Code of Georgia Annotated of 1933; and to execute such written instruments as may be necessary or appropriate to convey the fee simple title thereto to the reorganized Company; and to do and perform such other acts in behalf of South Western as may be necessary or desirable to fully consummate said Plan of Reorganization of the Debtor, with respect to the acquisition of South Western's railroads. A copy of this resolution is attached as Exhibit "A" to the petition of L. O. Benton, Jr., et al., vs. South Western Railroad Company, et al., and reference is made to this Exhibit for further particulars of the resolution.

14. The Stockholders of South Western met at the adjourned annual meeting held March 28, 1947, and assented to the acceptance of the plan, 30,137 shares of stock being voted in favor of the acceptance of the plan, and 9,057 shares of stock voting against acceptance of the plan.

15. March 28, 1947, South Western, in accordance with the assent of the holders of a majority of the Stock of South Western, mailed its ballot to the Interstate Commerce Commission, accepting the plan. After the creditors and leased lines had balloted on the plan, the result was certified by the Commission to this Court and, after a

hearing on June 4, 1947, this Court on July 14, 1947, overruled all objections to the plan and confirmed the plan, reserving the question in this case for future disposition.

16. The Plan provides for an issue of $14,000,000 of First Mortgage 4% Bonds due 1995, secured by a First Mortgage of the reorganized Company, which would be a first lien on all of the railroads of the Central (including the leased lines), the stock of the Ocean Steamship Company of [fol. 68] Savannah, and other collaterals; that there shall be issued $2,589,647 of 4½% Series "A" Income Bonds due 2020, and $13,410,353 4½% Income Bonds Series "B" due 2020, which Income Bonds shall be secured by a Mortgage which shall be a second lien on the same property as is covered by the First Mortgage. The capitalization of the reorganized Company is fixed on the theory that the railroad property of South Western will be acquired by the reorganized Company. The acquisition of the South Western lines would relieve the reorganized Company of rental and income taxes aggregating $411,550 per annum.

17. The plan provides that the reorganized Company may be the present Central of Georgia Railway Company or a railroad company to be organized as may be decided by the Reorganization Managers, with the approval of this Court.

18. The books of the South Western show as of December 31, 1946, the book value of the road and equipment of South Western is $9,523,736.81, which is made up of the capital stock, $5,191,100, plus a write-up on the books of $4,247,661.27, which represents additions and betterments put on the property by the Lessees from 1869 to 1913, plus miscellaneous items of $84,975.54. The Interstate Commerce Commission valuation—cost of reproduction, less depreciation, is $12,830,257. The book value and the Interstate Commerce Commission valuation were before the Commission and the Court when the allocation of securities was made to the South Western under the Plan.

The books of South Western show as of December 31, 1946, total current liabilities of $216,085.22, investment in bonds, $1,096,197.87, and an unappropriated surplus of [fol. 69] $5,433,641.31 (which includes the write up of $4,247,661.27).

19. For the years 1934 to 1940, inclusive, the annual losses from operation of the South Western Railroad were:

1934	$157,530
1935	143,046
1936	102,973
1937	158,375
1938	266,805
1939	238,669
1940	188,383
Total for 7 years	$1,255,781

These losses were computed on the Segregation formula approved by the Court.

Over and above these losses which were absorbed by the Central it paid rentals and organization expenses and income taxes aggregating $1,999,359, excluding the last six months of 1940 during which the Central operated the South Western for its account. In addition to proper maintenance, the Central spent over $3,400,000 for additions and betterments on the South Western lines. These additions and betterments are not reflected in the above statement of annual losses. It is estimated that if the South Western had been operated by the Central for account of the South Western, there would have been an operating deficit of $442,754 for the year 1946, and for the first 3 months of 1947 an operating deficit of $201,348.

[fol. 70] South Western was operated by the Debtor's Trustee for account of South Western for the period June 19, 1940, to June 30, 1943.

The earnings for this period were:

June 19, 1940 to Dec. 31, 1940—Deficit	$ 26,506.85
Year 1941	204,707.28
Year 1942	1,260,451.32
First 6 mos. 1943	1,293,659.98
Total	$2,732,311.73
Less Federal Income Taxes (estimated)	1,275,887.99
	$1,456,423.74
Less Additions and Betterments	50,424.82
Net	$1,405,998.92

The present cash position of South Western is derived in part from these war earnings.

At normal levels of business the operation of South Western has resulted in large annual losses for many years in the past. During the war years South Western and other parts of the Central and railroads generally had large net earnings. The war years and the war traffic are gone, leaving behind the highest wage scale ever paid railroad employees, the highest prices ever paid by railroads for materials and supplies and greatly reduced volume of business, both freight and passenger. A large part of the traffic of South Western is overhead or intermediate and largely competitive. From all of this it is apparent that the operation of South Western as an independent line, or by Central for account of South Western, is impractical from a financial standpoint.

[fol. 71] 20. South Western has no locomotives, cars, or shops, nor any of the many appliances necessary in the operating and maintaining of a railroad. It has no operating organization. If it operated its railroads, it would have to supply executive, operating, traffic, soliciting, and accounting departments, the cost of which would be large and would take time to provide. Properly equipped shops would cost at least $2,500,000; locomotives would cost approximately $5,670,000; freight cars approximately $4,500,000, and passenger equipment approximately $2,540,000. The equipment could be purchased and financed with a cash payment of 20%, and the balance in semi-annual payments for ten years at possibly 2½% per annum. If equipment is not purchased, the hire of equipment would be costly. The rail on the entire line between Fort Valley and Columbus, a distance of 69 miles, must be laid in 112 pound rail to take care of the heavy trains on that line, the cost of which would be about $1,350,000. 25 miles of rail has to be laid on the Macon to Albany line at cost for 90 lb. rail of $405,000. Some 112 pound rail is laid on the Macon-Albany line, and it will eventually have to be laid with 112 pound rail to take care of the heavy traffic. The line between Albany and Columbia and between Smithville and Eufaula require heavier rails, at an estimated cost of $675,000. A new bridge will have to be built over the Chattahoochee River at an estimated cost of $460,000. Open deck trestles and old culverts must be strengthened or replaced at an estimated cost of $545,000. Automatic signals

will have to be soon installed on the line between Fort Valley and Columbus at cost of about $360,000. It is further estimated that materials and supplies must be kept on hand and a working fund which would require about $600,000. These expenditures would require in the aggregate $19,605,000. Deducting the equipment payments of $10,210,000 which may be deferred, South Western would have to pro- [fol. 72] vide itself with $9,395,000 of capital, against which it has now about $1,000,000 free capital. On this much borrowed capital the interest would start at about $591,000 per annum and decrease to about $350,000 per annum as the equipment is paid for. The South Western is in no position to operate its own property and the probability is that the Central would be required to operate South Western for the account of South Western and the deficits would be charged to South Western and would be a lien on its property and, if history repeats itself, it seems that the deficits and necessary charges would finally exhaust the property.

21. The President of South Western wrote to its Stockholders four letters, dated March 14, 1947, April 8, 1947, April 11, 1947, and April 17, 1947, setting forth in detail the reasons which impelled the Directors of South Western to recommend to its Stockholders the acceptance of the plan; the reasons being in substance, that the Directors had exhausted all efforts to sell or otherwise dispose of the railroads of South Western, that it was impractical for South Western to undertake the operation of its railroad, that if operated by the reorganized Company for account of South Western the result would probably be disastrous and the risk was not justifiable, that the directors had held out to the last moment in the hope that they might receive a better offer for the property, but that the exigencies were such that it was wise and expedient to accept the plan, otherwise there would be grave and unjustifiable risks. These letters are in evidence and reference is made to them, for further details.

22. It is alleged in the petition filed in the Superior Court of Bibb County by L. O. Benton, Jr., et al., and admitted by South Western in its answer thereto, that the Stockholders of South Western at their annual meetings held March 9, [fol. 73] 1944, March 8, 1945, March 14, 1946, had resolved that the proposed plan to purchase the South Western's

properties was grossly unfair and inadequate and that the proposal was rejected. It was also alleged in said petition, and admitted by South Western in its answer, that at a meeting of Directors of South Western held July 6, 1945, the decision was reached that it was not necessary for South Western to take any action until the plan had first been approved by the creditors and was put up to the South Western for acceptance or rejection. The plan, however, contrary to this view of the Directors of South Western, was submitted by the Interstate Commerce Commission contemporaneously to the creditors of Central and to the leased lines. There is nothing in the plan to indicate that the plan would not be submitted to the leased lines until it had first been approved by the creditors.

23. The Petitioner has in the State suit, made all necessary efforts to obtain redress from the Officers and Directors of South Western, and from its stockholders at their meeting of March 28, 1947.

24. The Respondent, L. O. Benton, Jr., put in evidence a statement made by T. M. Cunningham, Counsel for the Trustee, at the Stockholders' meeting of March 28, 1947, in which he stated "The plan makes an offer to you gentlemen; that is all it does * * *." Mr. Cunningham admitted that he made this statement, but in connection with his admission stated "Of course, that is not all the plan says, but that is what in substance it does say—take it or leave it."

25. With reference to the contention that Samuel L. Varnedoe, a stock and bond broker, solicited proxies for 6,269 shares of South Western stock, which were voted in [fol. 74] favor of the acceptance of the plan at the meeting of stockholders of March 28, 1947, and that it was illegal to solicit proxies, and that if these solicited proxies were thrown out, a majority of stockholders would not have voted for the acceptance of the plan; it appears from the undisputed evidence that proxies for 4,990 shares of stock out of the 6,269 shares, were not solicited by Mr. Varnedoe; that the holders of these 4,990 shares were all clients of his to whom he had sold the stock, and that they voluntarily and of their own motion requested him to represent their stock. He admitted that the proxies for the other 1,279 shares of stock had been solicited by him.

26. The Internal Revenue Department of the United States sought to tax South Western under the Federal Capi-

ta) Stock Tax Act (I. R. C. Section 1200) "with respect to carrying on or doing business." This question was litigated in the United States District Court for the Middle District of Georgia and the Court decided in that case that South Western was not carrying on or doing business.

Conclusions of Law.

1. References to the applicable provisions of the Interstate Commerce Act and to the Bankruptcy Act are contained in foot note.[4]

2. Assuming that this Court has jurisdiction, Petitioner can proceed in a summary way by petition auxiliary to the original bankruptcy proceeding.[5]

[fol. 75] The process of the Bankruptcy Court in a Section 77 proceeding runs in all judicial districts, and therefore the Court has jurisdiction of the person of the Respondent.[6]

3. South Western as lessor, by virtue of its claim for equipment, and also in that if its lease is rejected it will have a claim for damages, is a creditor of the Central and

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[4] Interstate Commerce Act—Sec. 1 (18), Sec. 1 (20), Sec. 5, Par. 2 (a), Sec. 5, Par. 11.

Bankruptcy Act.—Sec. 2 (15); Sec. 77—Sub Sec. (a), Sub Sec. (6) (1) (5), Sub Sec. (c) (6), Sub Sec. (f).

[5] 1 High on Injunctions. Sec. 302 5 Remington on Bankruptcy, Sections 2193.50 & 2517. Local Loan Co. v. Hunt, 292 U. S. 234, 239, 240. Murphy v. John Hofman Co., 211 U. S. 562, 569. Wabash Railroad v. Adelbert College, 208 U. S. 38. Julian v. Central Trust Co., 193 U. S. 93, 112. Especially Continental Illinois Bank v. Rock Island R. Co., 294 U. S. 648, h. n. 10 and pp. 681 and 682.

[6] Sec. 77(a) of the Bankruptcy Act provides "Process of the Court shall extend to and be valid when served in any judicial district."

Continental Illinois Bank v. Rock Island R. C., 294 U. S. 648, 681; affirming 72 F.(2d) 443. In re Standard Gas & E. Co., 139 F.(2d) 149, 153; 119 F.(2d) 658, 663.

Thompson v. Terminal Shares, Inc., 24 F. Supp. 724, affirming on appeal 104 F.(2d) 1, is not applicable because it was a suit against adverse claimants in possession of property.

is included within the scope of the reorganization plan as a "creditor," as that term is defined in Section 77(b) of the Bankruptcy Act.[7]

South Western is a party to the reorganization proceedings and to the plan for all purposes connected with the plan.

4. The purpose of the suit filed in the State Court by L. O. Benton, Jr., et al. was to prevent the consummation of the plan as respects South Western. Their contention is that the plan can not be consummated as to the South Western without unanimous consent of the stockholders of South Western. The interlocutory injunction granted by the Superior Court of Bibb County specifically enjoined any acceptance of the plan by South Western "not authorized by unanimous vote of the stockholders of Defendant [fol. 76] Company." This is practically equivalent to a prohibition against any acceptance of the plan. The Court does not think that one stockholder or a small minority of the stockholders of South Western can hold up acceptance of the plan by South Western, and thus defeat an important provision of the plan which the Commission has in effect decided is in the public interest. If the Court is powerless to prevent this, there is a serious defect in the mechanics of reorganization.

5. "The judicial process in Bankruptcy proceedings under §77 is, as it were, brigaded with the administrative process of the Commission."[8] "The judicial functions of the Bankruptcy Court and the administrative functions of the Commission work co-operatively in reorganization."[9] "A

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[7] Sec. 77(b) of the Bankruptcy Act provides "The term 'creditors' shall include, for all purposes of this section all holders of claims of whatever character against the debtor or its property whether or not such claims would otherwise constitute provable claims under this Act, including the holders of claims under a contract executory, in whole or in part, and including an unexpired lease."

Group of Investors v. Milwaukee R. Co., 318 U. S. 523, 549, 550; Old Colony Bondholders et al. v. New York, N. H. and H. R. Co., 161 F.(2d) 413, h. n. 16.

[8] Palmer vs. Massachusetts 308 U. S. 579, 587, quoted in Smith v. Hoboken, 328 U. S. 123, 132.

[9] Warren v. Palmer, 310 U. S. 132, 137, 138.

proceeding under Section 77 is not an ordinary proceeding in bankruptcy. It is a special proceeding which seeks only to bring about reorganization, if a satisfactory plan to that end can be devised. And to prevent the attainment of that object is to defeat the very end the accomplishment of which was the sole aim of the section, and thereby to render its provisions futile." [10]

6. The acceptance of the plan by South Western involves its merger or consolidation and conveyance of its properties to the reorganized Company. The plan expressly provides that this shall be done if the plan is accepted by South Western. The method is left by the plan to the reorganization Managers, subject to approval by the Court. The plan explicitly provides that the transfer of the property or its sale, consolidation or merger shall be subject to the further [fol. 77] action of the Commission upon confirmation of the plan by the Court.

Jurisdiction is conferred on the Commission by Section 5, Par. 2(a) of the Interstate Commerce Act of the matter of the consolidation, merger, purchase, lease or operation of carriers. And Section 5, Par. 11 of the Act provides "The authority conferred by this section shall be exclusive and plenary." Section 77(b) of the Bankruptcy Act provides that the plan of reorganization may include "the merger or consolidation of the debtor with another corporation." Section 77(f) of the Bankruptcy Act provides that upon confirmation of the plan the Commission shall grant authority for "the transfer of any property, sale, consolidation or merger of the Debtor's property" and that the Judge may require "all other property and necessary parties to make any such transfer or conveyance."

The Bankruptcy Court and the Commission under the Federal Statutes have exclusive control of the matter of the merger or consolidation of South Western with the reorganized Company and the sale of the railroads of South Western to the reorganized Company. The proposal is made in the reorganization proceeding, and the acceptance or rejection must be made in the reorganization proceeding. What vote of stockholders is sufficient to authorize the South Western to act; the validity of its acceptance, and the validity of the acceptance, and the validity of the convey-

[10] Continental Bank & Trust Co. v. Rock Island R. Co., 294 U. S. 648, 676.

ance to be made in consummation of the Plan are all questions for the Bankruptcy Court and the Commission.

We hold that this Court as a Court of Bankruptcy, in connection with the powers conferred upon the Interstate Commerce Commission, has sole and exclusive jurisdiction in [fol. 78] this matter, and that the attempt of the Plaintiff in the State Court suit to precent the consummation of the Plan as it affects South Western, is an interference with the exclusive and prior jurisdiction of this Court.

While the Georgia State Court would have, in an ordinary case, jurisdiction to decide the question whether a Georgia Railroad Corporation could convey its railroads without unanimous consent of its stockholders, the case which was brought in the State Court by Benton, et al., had for its sole and only purpose the prevention of the acceptance of the Plan by South Western, notwithstanding they were aware of the fact, as is shown on the face of their petition, that the Commission and the Bankruptcy Court had already taken jurisdiction of the South Western for all purposes connected with the Plan of Reorganization. The Benton case seems to us a clear case of the invasion of the exclusive jurisdiction of the Commission and the Bankruptcy Court.

7. The Bankruptcy Court has prior jurisdiction. It had possession of the railroad property of the South Western, and it had been determined by the Commission and the Court that the acquisition of the South Western Railroad by the reorganized Company was in the public interest. The State Court had no jurisdiction over the consolidation with or merger of the South Western into the reorganized Company, or the sale of South Western to the reorganized Company. If any of the stockholders of South Western Railroad wished to raise any question as to the power of the South Western to convey its property, the Bankruptcy Court and the Commission had exclusive and plenary jurisdiction to decide that question.

8. Even if there is any law of Georgia or decision of the Courts of the State of Georgia, to the effect that South [fol. 79] Western could not convey its railroad properties without the unanimous consent of its stockholders, the Commission and the Bankruptcy Court have power to effect the merger, consolidation, or sale, notwithstanding any such provision of the State law.

Sub-section (f) of Section 77 of the Bankruptcy Act provides "upon confirmation of the plan the debtor . . . shall put into effect and carry out the plan and the orders of the Judge relative thereto and subject to the supervision and control of the Judge, the laws of any State or the decision or order of any State authority to the contrary notwithstanding."

Section 5 (11) of the Interstate Commerce Act which relates to consolidation, merger or sale, provides that the transaction may be effected "without invoking any approval under State authority", and further provides that the participating carriers "shall be and they are hereby relieved from the operation of the Anti-Trust laws and all other restraints, limitations, and prohibitions of law, Federal, State or Municipal, in so far as may be necessary to carry into effect the transaction so approved." And the Section further provides "but any power granted by this Section to any carrier or other corporation shall be deemed to be in addition to and in modification of its powers under its corporate charter or under the law of any State."

The decisions in support of this conclusion will be found in footnote 11.

[fol. 80] 9. With reference to the provision in Section 5 (11) of the Interstate Commerce Act, that carriers shall have power to merge, consolidate or sell their properties, "with the assent in case of a purchase and sale, a lease, a corporate consolidation or corporate merger, of a majority unless a different vote is required under applicable State law, in which case the number so required shall assent of the votes of the holders of shares entitled to vote," etc., we do not think the phrase "unless a different vote is required under applicable State law" should be construed to mean a unanimous vote, because such a construction would render the Statute unworkable in such a case. We think the phrase should be interpreted to mean more or less than a majority. We further think the words "applicable State

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[11] In re N. Y., N. L. & H. R. Co., 147 F. (2d) 40, 51; Palmer, Trustee, v. Mass., 308 U. S. 79; Texas v. U. S. 292 U. S. 522; In re Mo. Pac. R. Co., 39 F. Supp. 436; N. Y. Central Securities Co. v. U. S., 287 U. S. 12, 26, 27; Cleveland C. C. & St. La. Ry. Co. v. U. S., 275 U. S. 404, 414; Claiborne Annapolis Ferry Co. v. U. S., 285 U. S. 382, 391.

law" mean Statute law. These constructions are in harmony with and give effect to the further provisions of subparagraph 11 which have been previously quoted.

The Supreme Court of the United States has also held with reference to the provision in Section 5 (11) which relieves carriers from the operation of the Anti-Trust laws and "of all other restraints, limitations, and prohibitions of law, Federal, State or Municipal", that the scope of immunity is not limited to all of the same genus as anti-trust legislation.[12]

10. There are two recent notable cases decided by the Supreme Court of the United States which uphold the exclusive jurisdiction of the Commission over lines leased by a debtor in bankruptcy, and which stayed proceedings in the Court in reference to the leased lines until the Commission had the opportunity to exercise its jurisdiction.[13]

[fol. 81] 11. The Court, having exclusive jurisdiction of the subject matter, has power to issue an injunction to prevent, defeat or impairment of its jurisdiction, and this power is inherent in a Court of bankruptcy, as it is in a Court of equity.[14]

The prior jurisdiction of the Bankruptcy proceedings also gave the Bankruptcy Court the right to protect its jurisdiction by the process of injunction.[15]

Where the question is purely on- of State law and under special circumstances, and where the interest of the Estate and the parties may best be subserved, a Federal Court

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[12] N. Y. Central Securities Co. v. U. S., 287 U. S. 12, 26; Texas v. U. S., 292 U. S. 522, 534.

[13] Smith v. Hoboken R. R. Co., 328 U. S. 123; Thompson, Trustee v. Texas Mexican Ry. Co., 328 U. S. 134.

[14] Continental Bank & Trust Co. v. Rock Island Ry. Co., 294 U. S. 648, 675. Ex Parte Baldwin, 291 U. S. 610, 615. Thompson, Trustee, v. Magnolia Petroleum Co., 309 U. S. 478.

[15] Kline v. Burke Construction Co., 260 U. S. 226, 231. Looney v. Eastern Texas R. R. Co., 247 U. S. 214, 221. Dickerson v. Hopkins, 288 S. W. 1103 (Texas). Shannon v. Terry, 36 Fed. 337, 365. Ferguson v. Converse Co., 59 Ga. App. 305, 307.

which has exclusive jurisdiction may, nevertheless, remit the question to the State Court.[16]

But as we point out hereafter (Sub. 13) the question here is not a State law question; it is a Federal question arising out of the Bankruptcy Act and the Interstate Commerce Act.

Ordinarily the Bankruptcy Court is not at liberty to surrender its exclusive jurisdiction.[17] There is every rea-

But where such exceptional circumstances are not present, it is the duty of the Federal Court to decide the question, although it may be a question of State law, in the [fol. 82] absence of any controlling decision by the State Court.[18]

12. It is contended by Respondent that Section 265 of the Judicial Code prohibited the bringing of an injunction suit like this. But that section has been repeatedly held not applicable to such an injunction as this.[19]

13. The question of the consolidation, merger and sale, and under what conditions South Western may convey its property to the reorganized Company, in consummation of the plan, is not a question of State law; it is a question of Bankruptcy law—a question which arises under the Bankruptcy Act and the Interstate Commerce Act. It is, therefore, a question on which the Bankruptcy Court would not be bound to follow the decisions of the State Court and the

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[16] Thompson, Trustee, v. Magnolia Petroleum Co., 309 U. S. 478; Gardner v. State of New Jersey, 329 U. S. 565; In the Matter of State of New Jersey, Debtor, (decided by 3rd Cir. C. A. July 15, 1947). Spector Motor Service, Inc. v. McLaughlin, 323 U. S. 101.

[17] Isaacs v. Hobbs Tie & Tile Co., 282 U. S. 734, 739; U. S. Fidelity Co. v. Bray, 225 U. S. 205, 218 (dict.).
son here why it should not.

[18] Meredith v. Winter Haven, 320 U. S. 228; Markham, Alien Property Custodian v. Allen, 326 U. S. 490.

[19] Looney v. Eastern Texas R. Co., 247 U. S. 214, 221. Ex parte Baldwin, 291 U. S. 610, 615. Kline v. Burke Construction Co., 260 U. S. 226, 229. Dietzch v. Huidekoper, 103 U. S. 494, 497.

decision of the Bankruptcy Court would prevail over the decision of the State Court.[20]

14. The Federal legislation to which we have referred, which gives the Commission and Bankruptcy Court the [fol. 83] power to integrate the South Western Railroad as a part of the system of the reorganized Company, notwithstanding any State law or decision which may interfere therewith, is not unconstitutional on the ground that it impairs either the contract between the South Western and the stockholders or the contract between the stockholders themselves. The Federal legislation enacted within the powers conferred by Congress supersedes the State legislation and Congress has the undeniable authority to pass laws within the scope of the powers conferred by the Constitution, however such laws may operate collaterally or independently to impair or destroy the obligation of private contracts.[21]

15. In this matter the State Court acted in excess of its jurisdiction, and under the authorities such acts are void

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[20] "In determining the law applicable to the carrying out of federal powers federal courts are not bound by provisions of State laws and are bound to interpret provisions of the federal statutes in the best exercise of their judgment (h. n. 4). Although State law was properly followed in setting up intercorporate relations between Street Railways and underlying companies, the effect of these intercorporate relations in Reorganization Court, in matter of reorganization of Street Railway Company was to be determined by judicial application of Bankruptcy law (h. n. 5). Federal law must govern in determining what persons may be included in bankruptcy reorganizations (h. n. 6)." In re Pittsburgh Railways Co., 155 Fed. (2d) 477. Prudence Realization Corp. v. Gerst, 316 U. S. 89. Wragg v. Federal Land Bank, 317 U. S. 325. Burnett Com. v. Harmel, 289 U. S. 103. U. S. v. Pelzer, 312 U. S. 399. Morgan v. Commissioner, 309 U. S. 78, D'Oench Duhme & Co. v. F. D. I. C., 315 U. S. 447, 456.

[21] Continental Bank & Trust Co. v. Rock Island R. R., 294 U. S. 648, 6880; Hanover National Bank v. Moyses, 186 U. S. 181, 188; New York v. United States, 257 U. S. 591, 600, 601.

and can be annulled by the decree of the Court which has exclusive or prior jurisdiction.[22]

16. Petitioner has invoked the decision of this Court on the question whether the South Western can, under the law of Georgia, sell its railroad property without the unanimous consent of its stockholders. We have decided that even if the law of Georgia requires unanimous consent, the Commission and the Bankruptcy Court would not be bound thereby in the reorganization of the Central; but as an actual controversy exists as to this question, we have power under the Declaratory Judgment Act to decide the question and we think it is appropriate to do so.[23]

[fol. 84] 17. South Western Railroad Company, in holding the stockholders meeting was acting under Code Sections 94 328 and 94-329 of the Code of Georgia of 1933 which are copied in full in footnote 2. These Code Sections do not purport to amend any charter of any Corporation. They are laws of general operation and any corporation which comes within its terms may avail itself of the Code Sections. It is not necessary for the South Western Railroad Company by a vote of its stockholders to accept these Code Sections as a part of its charter. These Code Sections do not in any sense impair any obligation of the contract as between the stockholders themselves. In the exigencies stated in the Code Sections the Corporation may sell its property on the vote of a majority of its stockholders. This does not impair the contract among the stockholders. It is a safety valve for them, in case the corporation finds itself in the predicament stated in the Code Sections. South Atlantic L. & S. Corp., v. Norton, 149 Ga. 805, 812.

There is no law of the State of Georgia which requires unanimous consent of stockholders to enable a railroad company to sell its railroad. There is no law and no decision of the Courts of Georgia which hold that under no circumstances can a railroad or other corporation transfer all of its property without the unanimous consent of its stockholders.

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[22] 21 Corpus Juris Secundum, pages 176, 177, 178; French v. Hay, 22 Wall. 250; Kalb v. Feuerstein, 308 U. S. 433; United States v. Walker, 109 U. S. 258, and cases cited.

[23] Judicial Code Section 274 (d); U. S. C. A., Title 28, Section 400.

The Code Sections are consent on the part of the State that under the circumstances stated in the Code Sections the Railroad Company may sell all of its railroad. So that with this consent on the part of the State, this quasi public corporation stands in the same position so far as the sale of its property is concerned, as would any private corporation.

[fol. 85] 18. The Respondent contends that this Code Section is not applicable because the South Western lease is not terminated. The reply to this is that when the conveyance is made and the plan of reorganization consummated, that the lease will be terminated. The lease is terminated under the plan if the South Western rejects the plan, and, of course, the lease terminates if the South Western accepts the Plan.

As to the contention of the Respondent that the Code Sections contemplate the assent or agreement of all the Directors and not merely a majority, there is nothing in the Code Section as to whether the Board of Directors must act unanimously. It appears that all of the Directors, except two who were not present, resolved to accept the plan on the assent of a majority of the stockholders. Section 9 of the Act of 1845 under which the South Western was incorporated, provides that a majority of the Board shall be a quorum and the Act of December 11, 1862, (p. 87) provides for seven Directors.

With respect to the contention that the phrase "another railroad corporation" means a presently existing railroad corporation and not one hereafter to be formed, it is sufficient to say that when the time comes to make the conveyance there will be a corporation in existence to receive it. The plan of reorganization so provides. The plan provides for either a new corporation or that the present Central of Georgia Railway Company will be the reorganized Company.

The Respondent contends that the phrase "not a going concern" used in the Code Section does not fit the South Western. The words "not a going concern" are used in the sense of the Company not operating its railroad. The Internal Revenue Department sought to tax the South Western under the Federal Capital Stock Tax Act (I. R. C., [fol. 86] Sec. 1200), "with respect to carrying on or doing business." This question was litigated in the United States

District Court for the Middle District of Georgia, and Judge Deaver decided against the tax on the ground that the South Western was not carrying on or doing business. His decision is not reported, but a copy of it is in evidence.

19. At several meetings prior to the meeting of March 28, 1947, the stockholders of the South Western voted to reject the plan. These votes were premature. The plan was not submitted to the South Western by the Interstate Commerce Commission until February 11, 1947, to be voted on, on or before March 28th. This was the first time that the offer contained in the plan was made to the South Western. When the offer was made the South Western accepted it on March 28, 1947, subject to the assent of a majority of its stockholders.

20. The reorganized Central has power to purchase the South Western under Section 94 318 of the Code of Georgia of 1933 which is copied in the footnote 3, (Findings of Fact) Central is incorporated under this title. It has been decided that under this statute a majority vote of the stockholders was sufficient. Daly v. Georgia & Alabama R. Co., 112 Fed. 838. The power to consolidate with another company necessarily confers power on both corporations. Theis v. Spokane Falls and Gaslight Co., 49 Wash. 477, 95 Pac. 1074, 1079, 1080.

21. In the exigencies which confront the South Western, it clearly has power to sell its property to the newly Reorganized Company without the unanimous consent of its stockholders.

The evidence demonstrates that the South Western is in no condition to operate its own property and that, if it is [fol. 87] operated by the Central for the account of the South Western it will, in all probability, be operated at a large deficit. The exigencies of the South Western are, therefore, such that if it does not accept the Plan of Reorganization, it will be in a precarious condition and will likely suffer severe loss. Confronted with these conditions, there is no doubt about the power of the South Western to sell its property on a majority vote of its stockholders.

It is contended that South Western is solvent and that the book value of its stock is $180 per share, and that the Interstate Commerce Commission's valuation of road and equipment is equal to $240 per share. These figures were

before the Commission and the Court in considering the allotment to be made to South Western in the reorganization plan. The allotment made shows that very little weight was given to these figures. The allotment made is conclusive on South Western and its stockholders. The point is that South Western is in a precarious position and that it will probably not remain solvent if it does not accept the plan.

There are many cases decided by the Supreme Court of Georgia to the effect that, when a proposed amendment to a charter is fundamental, radical or vital, the unanimous consent of the stockholders to its acceptance is essential, but no case has been cited to us decided by the Supreme Court of the State of Georgia, which holds that, under any and all circumstances, unanimous consent of stockholders is requisite and necessary to the sale of the property of a corporation.

Two cases were cited by the Respondent which should be noticed: *Alexander v. A. & W. P. R. R. Co.*, 108 Ga. 151, and *City of Knoxville v. Knoxville & Ohio R. R.*, 22 F. 758. In the Atlanta & West Point Railroad case, the Railroad [fol. 88] Company sought to build a belt line railway. It had no power under its original charter to do so. Under the general railroad law, it could build a belt line but, before it could get the power conferred by the General Railroad Law, it had to be accepted by its stockholders. The Supreme Court decided, as this was a fundamental change in its charter, it would be necessary for the acceptance of the power conferred by the General Railroad Law to be ratified by unanimous vote of its stockholders. In the Knoxville & Ohio case, the majority of the stock of the Knoxville Company was owned by the East Tennessee Railroad Company. By agreement between the two Companies, they were consolidated, and the stockholders of the Knoxville Railroad Company received, in exchange for their property, stock of the East Tennessee Company. This suit was brought by the City of Knoxville, which owned $100,000 of the capital stock of the Knoxville Railroad Company. The contention was that the Knoxville Company did not have the power to transfer its property against the vote of a minority and to agree that the minority stockholders be given in exchange stock of the East Tennessee Company. The argument was that the minority stockholders could not be switched from stockholders in their own corporation to stockholders in another corporation. The Knoxville Company was insol-

vent. This case differs somewhat from the case at bar in that here it is not proposed to give the South Western's stockholders any stock in the Reorganized Company. They will be creditors of the Reorganized Company, not stockholders. It is doubtful if this case would have been decided in the way it was if the East Tennessee Company had not owned the majority of the stock of the Knoxville Company. The case is of doubtful authority in view of the modern law on the subject.

[fol. 89] In *Plant v. Macon Oil & Ice Company*, 103 Ga. 666, the Court held, on a review of all the authorities, that: "A minority of stockholders cannot compel a corporation against the wishes of a majority of the owners of the stock therein, to continue a business that will be unprofitable or ruinous in its results to the interests of all concerned; hence it has been often held that an insolvent corporation has a right to make an assignment for the benefit of its creditors which right does not depend upon the assent of all its stockholders." The modern doctrine, as stated in Fletcher Cyclopedia Corporations, Section 5797, is that, when the exigencies of the situation demand it, that a minority of the stockholders cannot prevent a sale of all the property and its liquidation, if that is manifestly in the interest of the stockholders as a whole. The South Western is not now insolvent but, if it did not accept the proposed Reorganization Plan, the probability is that it would become insolvent. We think that, under these circumstances, and under the circumstances set forth in Code Section 94-328, that the South Western can sell its Railroad with the assent of the majority of its stockholders. In this matter the South Western is on the same plane as a private corporation, although it is a quasi public corporation, because the State, by virtue of Code Section 94-328, has assented to the sale of the property of the South Western on the vote of a majority of its stockholders and has also assented under Code Section 94-318. The general trend of authority supports the cited text of Fletcher Cyclopedia Corporations.[24]

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[24] On the general subject, the following cases may be consulted:

Calnan v. Guaranty Security Co., 271 Mass. 531, (171 N. E. 830).

Patterson v. Shattuck Arizona Copper Co., 186 Minn. 611, (244 N. W. 281).

Geddes v. Anaconda Copper Mining Co., 254 U. S. 590.

On the proposition that a sale may be effected by a major-

[fol 90] 22. It is claimed in the answer of the Respondent that of the 30,137 shares of stock which were voted at the meeting of South Western stockholders, that 6,269 shares were solicited by Samuel L. Varnedoe, a Broker, and that the solicitation of proxies from stockholders was unlawful, and if these shares which were unlawfully solicited are thrown out, that there would have been voted for the acceptance of the plan only 23,868 shares, which is short of a majority of the total number of shares of stock. The only law which was cited to the Court which bore upon this question is sub-section (p) of Section 77 of the Bankruptcy Act, but this Section of the Bankruptcy Act only prohibits the solicitation of proxies from any creditors or shareholder of the Debtor. We do not think that there is anything in this Statute which prohibits the solicitation of proxies from the shareholders of the South Western Railroad Company. The plan was not submitted by the Commission to the stockholders of the South Western to be voted on. It was submitted to the South Western Company itself, and the Directors of the South Western resolved to accept the plan, subject to the assent of a majority of their stockholders. The only prohibition against soliciting proxies is from the shareholders of the Debtor. Although the South Western may be technically a creditor, its stockholders are not creditors of the Debtor within Sub-section (p) of Section 77; the stockholders are not agents of the Corporation, do not own the property of the Corporation, cannot contract on its behalf, are not liable for its debts, and there is no relation of debtor and creditor and the stockholders are wholly distinct from the Corporation. Cook on Stockholders, Sections 267, 271 and 709.

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ity vote against the dissent of minority stockholders when the sale is expedient, see the cases cited in footnote 57, Section 5797, of Fletcher Cyc. Corporations; particularly Deidenkopt v. Des Moines Life Ins. Co., 160 Iowa 629, (142 N.W. 434); also reported in 46 L. R. A. (N. S.) 290, where this question is considered at length and the decisions supporting the rule are reviewed. See also

Section 2947 Fletcher Cyclopedia Corporations, where this question is reviewed at some length; Cardiff v. Johnson, 218 Pac. 269. Inhabitants of Waldoboro v. Knox & Lincoln R. R. Co., 24 Atl. 492. Laumann v. Lebanon Valley R. R. Co., 30 Pac. 42. Peeples v. The Westerly Water Works, 37 Atl. 807.

[fol. 91] Moreover, Mr. Varnedoe testified, and his testimony is undisputed, that of the 6,269 shares voted by him as proxy, 4,990 shares of stock which he voted as proxy were not solicited by him at all, but that as he was a large dealer in this stock and had sold a large amount of it to his clients, that when the time came to vote on the plan they consulted him and asked his advice and requested him to vote for their stock for them. The balance of 1,279 shares of stock which he voted was solicited by him.

Let an order be taken granting a permanent injunction against the Respondents and all of the stockholders of South Western in conformity herewith.

This 15th day of August, 1947.

F. M. Scarlett, Judge, United States District Court.

[File endorsement omitted.]

[fol. 92] In the United States District Court for the Southern District of Georgia, Savannah Division

In Proceedings for the Reorganization of a Railroad.

In the Matter of:

Central of Georgia Railway Company, Debtor

No. 4829

Merrel P. Callaway, as Trustee of the Debtor, Petitioner,

v.

L. O. Benton, Jr., et al., Respondents

Order Granting Permanent Injunction—Filed August 15, 1947

The above stated petition of Merrel P. Callaway, as Trustee of the Debtor, against L. O. Benton, Jr., et al., having come on to be heard, and evidence having been taken and the case having been argued by Counsel, both orally and by brief, and an opinion in the case having been rendered this day;

It Is Thereupon, in conformity with said opinion, Ordered, Considered, And Adjudged, that the Respondent, L. O. Benton, Jr., is hereby permanently restrained and enjoined from prosecuting his petition brought against

South Western Railroad Company and its Directors in the Superior Court of Bibb County, Georgia, which is more particularly described in the petition of the Trustee of the Debtor; and the said L. O. Benton, Jr., and Dr. W. G. Lee, I. L. Domingos, Gordon S. Chapman, J. F. Illges, Jr., and Charles Loridans, intervening stockholders of South Western Railroad Company in this matter, are permanently restrained and enjoined from bringing or prosecuting any [fol. 93] other similar suit against South Western Railroad Company, or its Directors, in the Superior Court of Bibb County, Georgia, or elsewhere than in this Bankruptcy proceeding; and all other stockholders of South Western Railroad Company are likewise permanently restrained and enjoined from bringing any such suit or suits except in this Bankruptcy Proceeding.

It Is Further Ordered And Adjudged that the temporary injunction granted by the Judge of the Superior Court of Bibb County, on April 24, 1947, in the above stated suit of L. O. Benton, Jr., against South Western Railroad Company and its Directors, being in excess of the jurisdiction of the Superior Court of Bibb County, Georgia, and being contrary to the exclusive and prior jurisdiction of this Court in this matter, is null and void, and of no effect, and shall not interfere with or prevent the acceptance of the plan of reorganization of Central of Georgia Railway Company by South Western Railroad Company or its Directors, or the consummation of said plan of reorganization by them as it respects South Western Railroad Company.

This 15th day of August, 1947.

F. M. Scarlett, Judge, United States District Court.

[File endorsement omitted.]

[fol. 94] In the United States District Court

[Title omitted]

Notice of Appeal—Filed September 9, 1947

Notice is hereby given that L. O. Benton, Jr., respondent above named, and Dr. W. G. Lee, I. L. Domingos, Gordon S. Chapman, J. P. Illges, Jr. and Charles Loridans, individually and as members of the Executive Committee of the Stockholders Protective Committee of South Western Railroad Company, Interveners in support of the petition of L. O. Benton, Jr., hereby appeal to the United States Circuit

Court of Appeals for the Fifth Circuit from the final judgment and order granting a permanent injunction and annulling the interlocutory injunction granted by the Judge of the Superior Court of Bibb County, on April 24, 1947, in the suit of L. O. Benton, Jr. against South Western Railroad Company and its Directors, entered in this action on the 15th day of August, 1947.

[fol. 95] Dated this 9 day of September, 1947.

Charles J. Bloch, Ellsworth Hall, Jr., Attorneys for Appellants.

614-8 Persons Building,
Macon, Georgia.

Due and legal service of the within and foregoing notice of appeal is hereby acknowledged. Notification of the filing of appeal contemplated to be given by the Clerk is hereby waived.

This, September 9, 1947.

T. M. Cunningham, Walter A. Harris, Attorneys for Appellee, Merrel P. Callaway, as Trustee of the Debtor. Wallace Miller, Attorney for Appellee, South Western Rail Road Company.

Persons Bldg.,
Macon, Ga.

[File endorsement omitted.]

[fol. 96-97] [Title omitted]

Bond on appeal for $250.00—approved and filed September 9, 1947, omitted in printing.

[fol. 98] In United States District Court

Stipulation as to Designation of the Parts of the Record, the Proceedings, and the Evidence, to Be Included in the Record on Appeal of the Above Stated Case by L. O. Benton, Jr., et al.—Filed September 9, 1947.

It Is Hereby Stipulated And Agreed between the parties in the above stated case as follows:

1. That parts of the record, proceedings, and evidence, hereinafter designated shall be transmitted to the Circuit Court of Appeals for the Fifth Circuit, and are all that are necessary to a clear understanding of the case.

2. That the Findings of Fact set forth by the Court in its Findings of Fact of August 15, 1947, are correct.

3. In the Report of the Interstate Commerce Commission of July 13, 1945, on the said Plan of Reorganization, the Commission quoted from the Plan proposed by the Debtor's Trustee as follows:

"4. *Provisions for execution of the plan. (a) Treatment of leased lines.*—The properties dealt with in the plan include the properties at present leased to the debtor by the South Western Railroad Company, Augusta and Savannah Railroad, and Chattahoochee & Gulf Railroad Company. It is assumed in this plan that these properties will be acquired in some manner as a result of the acceptance of the plan by the leased line security holders; but that if the offers are not accepted by any or all of the leased lines, the leases of any such line or lines are to be disaffirmed. The [fol. 99] exact method of acquisition, whether through purchase, merger, or consolidation, is not at present determined but, subject to the approval of the Commission and the Court, is left to the judgment of the trustee or the reorganization managers when they begin to function, in order that it may be accomplished by a method which will be most advantageous to the reorganized company.

"Specifically, it is proposed that the railroads of each of the three leased lines and the personal property appurtenant thereto and all of the real estate owned by each shall be conveyed to the reorganized company; that each of said lessors shall waive any damages to which each lessor has become or shall become entitled to on account of any alleged breach of lease and that the South Western shall waive all claims in respect to equipment, each in consideration of the delivery to it of the new securities proposed to be allocated to it as hereinbefore specified; provided, however, that this proposal as to the Chattahoochee & Gulf Railroad Company shall be subject to withdrawal if the reorganized company shall not acquire the railroads of the South Western.

"Securities offered to the leased lines would not bear interest or dividends for any period prior to acquisition of the respective leased lines.

"If the plan provisions should not be accepted as to any of the leased lines, the lease of such line, or lines,

would be disaffirmed as of such time as the District Court determines that the security holders of said line have not consented to the proposals contained in this plan. Thereupon, the remedies which such leased line and its security holders would have would, it is assumed, be limited to (1) the taking back of its property covered by the rejected lease, and (2) the payment of any sums due under the terms of [fol. 100] the respective leases as modified from time to time during the receivership and the reorganization proceedings of the debtor. While such lessor would also have a claim for damages for breach of lease upon disaffirmance in such amount as it might establish before the Court, the debtor trustee believes that no securities or cash would be allocable for the payment of such claim because the same would be considered an unsecured claim similar to the other unsecured claims for which no provision is made in this plan."

4. In addition to the extracts from the Plan of Reorganization of Central of Georgia Railway Company, quoted by the Court in paragraphs 8 and 10 of the Findings of Fact by the Court, the said Plan contains the following extracts.

(1) "The construction of the Plan by the Court, whether before or after submission of the Plan to the creditors, shall be final and conclusive. (261 I. C. C. 534).

(2) "The carrying out of the Plan shall be as provided in the Bankruptcy Act (261 I. C. C. 534).

5. The reports of the Interstate Commerce Commission of the Plan of Reorganization of Central of Georgia Railway Company are contained in 261 I. C. C. pp. 263, 501, and 627, and the Plan as modified and amended is reported in 261 I. C. C. beginning at page 514. These reports of the Commission were introduced in evidence and may be referred to by either party (see Section 14 (3) of the I. C. Act and Robinson v. B. & O. R. R. Co., 222 U. S. 506).

[fol. 101] Designation of Evidence.

6. The following additional portions of the evidence are designated to be transmitted by the Clerk of the Court:

(a) Resolutions of the meeting of March 28, 1947, of the stockholders of South Western Railroad Company;

(b) The four letters written by the President of South Western Railroad Company to its stockholders dated, respectively, March 14, 1947, April 8, 1947, April 11, 1947, and April 17, 1947;

(c) The decision of the Judge of the United States District Court for the Middle District of Georgia, that South Western was not liable for the Federal Capital Stock Tax because it was not doing business;

(d) The following portions of the record of the case of L. O. Benton, Jr., et al. v. South Western Railroad Company, et al., filed in the Superior Court of Bibb County, Georgia;

(1) Original petition with process and service;

(2) Response of South Western Railroad Company by its Counsel, Wallace Miller, Esq., to rule to show cause;

(3) The answer of South Western Railroad Company, Anton P. Wright, Andrew J. Lyndon, and Wallace Miller, filed April 19, 1947;

(4) Acknowledgment of service of B. J. Tarbutton;

[fol. 102] (5) Demurrer of South Western Railroad Company, Anton P. Wright, Andrew J. Lyndon, and Wallace Miller;

(6) Motion of Charles J. Haden to be stricken as a party, with order thereon;

(7) Judge Atkinson's order and judgment of April 24th;

(8) Bill of Exceptions Pendente Lite of South Western Railroad Company, Anton P. Wright, Wallace Miller, and Andrew J. Lyndon, with certificate of the Judge and evidence of service.

Designation of Record.

7. The following portions of the record in the case of Merrell P. Callaway, as Trustee of Central of Georgia Railway Company, vs. L. O. Benton, Jr., et al., are hereby designated:

(a) Petition of Merrel P. Callaway, as Trustee of the property of the Debtor, v. L. O. Benton, Jr., and Charles J. Haden and South Western Railroad Company filed in this

Court April 18, 1947, omitting the Exhibits thereto which are copied in the transcript of the evidence;

(b) The rule to show cause issued on said petition;

(c) Temporary restraining order granted by the United States District Court April 18, 1947;

(d) Motion of L. O. Benton, Jr., to dismiss the petition of Merrel P. Callaway, Trustee;

[fol. 103] (e) Answer of South Western Railroad Company to the petition of Merrel P. Callaway, Trustee;

(f) Responsive pleading of L. O. Benton, Jr. to petition of Merrel P. Callaway;

(g) Amended petition of Merrel P. Callaway, Trustee, and the order allowing the amendment, omitting from the petition Exhibit "A" attached thereto, which is copied in other parts of the record;

(h) Objections to L. O. Benton, Jr., to the allowance of the amendment to the petition of Merrel P. Callaway, Trustee;

(i) Response of L. O. Benton, Jr., to the proposed amendment of petition of Merrel P. Callaway, Trustee;

(j) Amendment of the Defendant, L. O. Benton, Jr., to his responsive pleading to the petition for amendment of Merrel P. Callaway;

(k) Order of the Judge of the United States District Court of the 26th of May, 1947, continuing the temporary restraining order until the further order of the Court;

(l) Intervention of Dr. W. G. Lee, et al., and the order of June 19, 1947, to show cause why said intervention should not be allowed, and the order of June 24, 1947, allowing said intervention;

(m) Findings of Fact and Conclusions of Law of the United States District Court filed August 15, 1947;

[fol. 104] (n) Order of the United States District Court granting a permanent injunction on the petition and amendment thereto, of Merrel P. Callaway, Trustee;

(o) The appeal of L. O. Benton, Jr., et al., and acknowledgment of service thereon;

(p) Bond on appeal;

(q) This Stipulation as to the designation of the parts of the record, the proceedings, and the evidence to be included in the record on appeal of this case.

8. It is further stipulated and agreed between the parties in the case stated that all the record and proceedings and evidence in this case are designated as a part of the record for consideration by the Circuit Court of Appeals for the Fifth Circuit and, therefore, no statement of points is required under Rule 75(D) of the Federal Rules of Civil Procedure.

This September 9th, 1947.

Charles J. Bloch, Ellsworth Hall, Jr., Attorneys for L. O. Benton, Jr., Dr. W. G. Lee, I. L. Domingos, Gordon S. Chapman, J. P. Illges, Jr., and Charles Loridans. T. M. Cunningham, Walter A. Harris, Attorneys for Merrel P. Callaway as Trustee of the property of the Central of Georgia Railway Company. Wallace Miller, Attorney for South Western Railroad Company.

[fol. 105] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

Transcript of Evidence—Filed August 27, 1947

EXHIBIT

Minutes of the adjourned annual meeting of the stockholders of South Western Railroad Company, held in the Superior Courtroom in the Bibb County Courthouse, Macon, Georgia, at 10 A.M., E.S.T., March 28, 1947

The adjourned meeting of the stockholders of South Western Railroad Company was held in the Superior Courtroom, Bibb County Courthouse, at 10 o'clock a. m., E. S. T., on March 28, 1947.

Wallace Miller, elected chairman of the stockholders' meeting at the regular annual meeting held on March 13, 1947, presided; and Andrew J. Lyndon, also elected secretary at the regular annual meeting, acted as secretary.

The meeting was called to order promptly at 10 o'clock, and the chairman appointed a Proxy Committee consisting of Andrew Prather, chairman; Samuel L. Varnedoe; L. O.

Benton, Jr.; Herschel V. Jenkins, and Andrew J. Lyndon, to examine the proxies as to form and execution, to count them, and report back to the meeting.

The meeting was recessed, awaiting the report of the Proxy Committee, and called to order again at 2:15 p. m., [fol. 106] at which time Chairman Prather, speaking for the Proxy Committee, reported 31,497 shares of stock represented by proxy, and 8,077 shares represented in person, making a total representation of stock of 39,574 shares.

Charles J. Bloch moved that the proxies in the name of Sam L. Varnedoe not be counted, on the ground that Mr. Varnedoe, in the solicitation of the proxies for the acceptance of the Central's plan of reorganization, was representing Central of Georgia Railway Company interests who would be the beneficiaries of a vote of acceptance by South Western's stockholders. This motion was put to a vote of the stockholders, and the vote on the motion was: For the motion, 4,376 shares; against the motion, 25,160 shares. Whereupon the chairman declared the motion to be lost.

The chairman then read to the meeting a letter from the Interstate Commerce Commission in response to a request of South Western Railroad Company for an extension of sixty days in the time within which it should be required to vote for or against acceptance of the plan of reorganization. This letter from the Commission stated in substance that the Commission would not oppose the grant of additional time by the reorganization Court.

Mr. Bloch was recognized by the chair and spoke at some length in opposition to the acceptance of the plan of reorganization by the South Western Railroad, and wound up his argument by requesting that the stockholders' meeting be recessed and a meeting of the Board of Directors be called so that he might present to the Board of Directors a request that their action in authorizing a sale of South Western's physical properties to the reorganized Central [fol. 107] of Georgia Railway Company, and their recommendation to the stockholders that the plan of reorganization be accepted, be rescinded by the Board. This request of Mr. Bloch's was denied by the Board of Directors in the open stockholders' meeting.

Charles J. Bloch then moved an adjournment of the meeting until May 28, 1947. The chairman put this motion before the meeting, and the vote on the motion was: For the motion, 4,376 shares; against the motion, 31,429 shares.

Whereupon, the chair declared the motion to postpone t
meeting was lost.

Charles S. Sanford then offered a resolution, a copy
which is hereto attached.

Whereupon, Charles J. Bloch offered as a substitute f
the Sanford resolution the following resolution:

Resolved, that the stockholders of the South Weste
Railroad Company, in convention assembled, do hereby
struct the officers and directors of said company to take t
position that the Act of the General Assembly of Georgia
1933 (Georgia Laws 1933, p. 235) has no application to t
South Western Railroad, and that if it is so applied it wou
be unconstitutional and void with respect to the Sou
Western Railroad and its stockholders.

Both resolutions were discussed by many stockholde
T. M. Cunningham, General Counsel for Merrel P. Cal
way, Trustee, spoke on the advisability of adopting the Sa
ford resolution. President Anton P. Wright, of the Sou
Western Railroad, explained to the meeting why he h
concluded to recommend acceptance of the offer. Andr
J. Lnydon explained to the meeting why, as a Director,
had decided it was in the interest of the stockholders
[fol. 108] recommend to the stockholders that the plan
reorganization be accepted. Herschel V. Jenkins explain
his position as a Director of South Western Railroad Co
pany with reference to the recommendation of the Boa
of Directors to the stockholders that the plan of reorganiz
tion be accepted. Grady Atkinson, R. C. Souder, Dr. W.
Lee, and L. O. Benton, Jr. all spoke in favor of the substitu
resolution offered by Charles J. Bloch.

Wallace Miller addressed the meeting from the cha
reviewing South Western's litigation with the trustee
the Central and other adversary parties at interest in t
Central of Georgia reorganization, and giving the stoc
holders the reasons which impelled him, as a Director,
recommend to the stockholders the acceptance of the pl
of reorganization.

Chairman Wallace Miller gave every stockholder an o
portunity to be heard for or against the resolutions befo
the meeting, and when no other stockholders desired
speak on the question before the meeting, the substitu
resolution of Charles J. Bloch was put to a vote. The res
of this vote was: For the Bloch resolution, 4,615 share
against the Bloch resolution, 31,411 shares. Whereupo

the chair announced that the substitute resolution was lost.

A vote on the Sanford resolution was then taken, resulting in a vote in favor of the Sanford resolution of 30,137 shares, and against the Sanford resolution, 9,057 shares. Whereupon, the chair announced that the Sanford resolution had been duly adopted. On the vote on the Sanford resolution, Andrew Prather asked to be recorded as not voting.

[fol. 109] Before the vote was taken on the Bloch substitute resolution and the Sanford resolution, L. O. Benton, Jr., made a minority report for the Proxy Committee, in which he challenged the action of the majority of the Proxy Committee in reporting a total of 39,574 shares represented, either in person or by proxy, on the ground that there were a number of proxies counted in this total signed by persons in a representative capacity without attaching to the proxy a power of attorney or other proper documentary evidence showing the authority of the person signing the proxy to execute the same in behalf of the beneficial owner.

The report of the ma-ority of the Proxy Committee was put to a vote of the meeting and was approved and so declared by the chairman.

There being no further business to come before the meeting, it was declared adjourned by the chairman.

Andrew J. Lyndon, Secretary.

A Resolution Assenting to the Acceptance by the Board of Directors of the Provisions of the Approved Plan of Reorganization of the Central of Georgia Railway Company with Respect to the Acquisition of the Properties of the South-Western Railroad Company, Attached to the Foregoing Minutes Being the Resolution Offered by Charles S. Sanford.

Whereas, the Board of Directors of the South-Western Railroad Company, at a meeting held at Macon, Georgia, at the principal office of the company, on the 13th day of [fol. 110] March, 1947, adopted a resolution that the provisions of the approved plan of reorganization of the Central of Georgia Railway Company, with respect to the acquisition of The South-Western Railroad Company, be accepted by The South-Western Railroad Company, subject to the assent to said acceptance by the holders of a majority of South-Western Railroad Company stock, a copy of which resolution was submitted to this meeting;

Now, Therefore, Be It Resolved that the stockholders of The South-Western Railroad Company do hereby assent to the acceptance by the Board of Directors of this company of the provisions of said approved plan of reorganization of the Central of Georgia Railway Company; with the proviso, however, that in the event the present approved plan of reorganization of the Central of Georgia Railway Company should not be finally consummated and put into effect, then this assent of the stockholders of The South-Western Railroad Company to the acceptance of said plan by its Board of Directors shall be inoperative and ineffective to authorize a sale of The South-Western Railroad Company's properties to the reorganized company.

Be It Further Resolved that a copy of the resolution of the Board of Directors be attached to the minutes of this meeting, and that said resolution be, and it is hereby, confirmed and ratified; and the Board of Directors of this company are hereby authorized, through their proper officers, to do all things necessary or appropriate to fully consummate said plan of reorganization with respect to the acquisition of The South-Western's railroads, subject, however, to the proviso that in the event the present approved plan of reorganization of the Central of Georgia Railway Company should not be finally consummated and put into effect, then [fol. 111] this resolution shall be inoperative and ineffective to authorize the sale of South-Western's properties to the reorganized company.

EXHIBIT

Office of the
South Western Railroad Company,
404 Bankers Insurance Building,
Macon, Georgia.

March 14, 1947.

To the Stockholders of The South Western Railroad Company:

The plan of reorganization of the Central of Georgia Railway Company proposed and advocated by M. P. Callaway, its Trustee in Bankruptcy, and approved by the Interstate Commerce Commission and by the Bankruptcy Court provides that the physical properties of The South Western

Railroad Company shall be acquired by the reorganized company and paid for by issuing to South Western $2,138,972.00 of First Mortgage 4% bonds of the reorganized company and $1,720,901.00 of 4½% income bonds Series "B" of the reorganized company.

With respect to the leased lines of the Central, including The South Western Railroad, the plan of reorganization provides:

"If the plan provisions should not be accepted as to any of the leased lines, the lease of such line, or lines, would be disaffirmed as of such time as the District Court determines that the security holders of said line have not consented to the proposals contained in this plan. Thereupon, the remedies which such leased line and its security holders would have would, it is assumed, be limited to (1) the taking back of its property covered by the rejected lease, and (2) the [fol. 112] payment of any sums due under the terms of the respective leases as modified from time to time during the receivership and the reorganization proceedings of the debtor."

In the opinion of the District Court, approving the plan of reorganization, as proposed by the Interstate Commerce Commission, it is provided:

"If the lessors do not accept the proposal to acquire their lines, they are, on disaffirmance, at liberty to take their properties back."

So it is that under the terms of the approved plan South Western is not required to accept the trustee's offer of purchase, but may take its property back and operate it or petition the Court to require the new company to operate South Western's railroads at the risk and for the account of South Western as provided by the Bankruptcy Act.

Under the plan of reorganization of the Central of Georgia Railway Company, each share of the 50,471 shares of South Western stock outstanding in the hands of the public will receive in payment $42.4 par value of new First Mortgage 4% Bonds and $34.1 par value of Series "B" 4½% Income Bonds.

Your directors wish at this time that they could tell you the market value of these new securities which are offered to you by the Central of Georgia Railway Company in exchange for your physical properties. We are unable to do

this for the reason that no market as yet has been established even on a "when issued" basis for these new securities.

Considerable study has been made of these values and opinions vary widely as to the probable market in them. Our information is that one expert opinion states that statis- [fol. 113] tically these new securities of the Central of Georgia Railway Company are comparable in value to the securities issued by the Seaboard Air Line Railway and the St. Louis-San Francisco Railway Company in their recent reorganizations.

At the present time the new Seaboard First 4s are quoted slightly above 100 and the Seaboard Income Bonds in the neighborhood of 74. The St. Louis-San Francisco new First Mortgage Bonds are quoted as approximately 91 and their Income Bonds about 56. Both of these railroads operate in similar sections of the country to that served by the Central of Georgia Railway Company and if the St. Louis-San Francisco values are applied to the new Central of Georgia Bonds a market value will be produced of $57.66 per share upon the 50,471 shares outstanding in the hands of the public.

In addition to this the South Western Railroad Company has in its hands government and municipal securities of the market value as of December 31, 1946 of $1,124,581.25. Your directors, however, have deemed it prudent, in order to provide against tax contingencies, to deduct from that sum the sum of $200,000.00 leaving for distribution $924,581.25, which is equivalent to $17.82 per share upon the 51,911 outstanding shares of the Company. This $17.82 per share added to the $57.66 would produce $75.48, assuming, of course, that the new Central bonds will be comparable in market price to the St. Louis-San Francisco Bonds, which we do not and cannot positively assert.

As directed by the stockholders, counsel for your company made a sustained and diligent effort before the Interstate Commerce Commission and the Reorganization Court to have South Western's existing lease adopted by the reorganized company. Before both the Commission and the District Court, your counsel stressed South Western's position in the heart of the Central's system, connecting Cen- [fol. 114] tral's Georgia properties with its Alabama properties; South Western's character and service as a bridge line of the Central's system; South Western's necessity in connection with the handling of traffic interchanged with

the Ocean Steamship Company; the importance and value of the Central's system of South Western's small capitalization and the resulting low rental on the basis of a 5% return; seventy-five years of operation as an integral part of the Central's system; South Western's indispensability to the profitable operation of the Central as an integrated system; and the fact that severance of South Western would mean a dismemberment of the Central system.

However, both the Commission and the Court were adamant in their view that South Western's lease, if adopted, would prove a serious hazard to the solvency of the new company in future years.

The alternative to acceptance of the provisions of the plan lie in a sale or lease to interests other than the new Central Company, in the taking back and operating our property ourselves, or in an operation by the new company for the account and at the risk of South Western. Your directors have fully explored the possibility of a sale or lease of our property or more advantageous terms than those offered in the plan, but have been unable to secure a firm offer from any responsible interest. In the judgment of your directors, the risk of taking our property back and undertaking to operate it ourselves, or the risk of an operation by the new company for the account of The South Western, more than offsets what your directors regard as the inadequacy of the value placed upon South Western's railroads by the Commission and the Court in the approved plan.

The situation in which South Western finds itself is such that, though your directors still adhere to the opinion that South Western's value to the Central system is substantially greater than the amount offered for our property in the [fo. 115] approved plan, yet a realistic view must of necessity be taken of South Western's present position, and all factors affecting the interests of the stockholders carefully considered. Taking such view, your directors feel that in the exercise of the trust placed in them by the stockholders, they should recommend to the stockholders the acceptance of the provisions of the approved plan of reorganization with respect to the acquisition by the new company of South Western's railroads.

Under the laws of Georgia the assent of a majority of our stockholders is required to a sale or lease of our railroad properties. Should the stockholders desire to accept

the offer to purchase the physical properties of our company contained in the plan of reorganization, such acceptance must be authorized by a vote of a majority of the stockholders.

You will find enclosed a notice and proxy of the adjourned annual meeting of the stockholders to be held at 10 o'clock a. m., E. S. T., on March 28, 1947. If you cannot attend the meeting in person, you are urgently requested to return the proxy, with your vote for or against the acceptance of the offer of purchase contained in the plan. A failure to return the proxy duly executed will in effect be a vote against the acceptance of the offer, because the law of Georgia requires the affirmative vote of a majority of all stockholders to authorize a sale of our properties, and not a majority of those who actually vote.

Respectfully submitted by order of the Directors.

Anton P. Wright, President

[fol. 116] EXHIBIT

Office of
The South Western Railroad Company,
404 Bankers Insurance Building,
Macon, Georgia.

April 8, 1947.

To the Stockholders of the South Western Railroad Company:

In view of the statements contained in a series of letters mailed to South Western stockholders by Mr. L. O. Benton Jr., with respect to the action of your Board of Directors in recommending acceptance of the plan of reorganization of the Central of Georgia Railway Company, it is deemed appropriate by your Board to send you this letter.

At the outset your Board desires to make it plain to the stockholders that the $3,970,000 par value of First Mortgage and Income Bonds of the reorganized company, allocated to the purchase of South Western's physical properties in the Central's plan of reorganization, was not the result of negotiations between your Directors and Mr. Merrell Callaway, the Central's Bankruptcy Trustee, but was the value placed on your properties by the Interstate Commerce Commission after a lengthy hearing upon all aspect

of Central's reorganization, and after a full presentation of South Western's case for the adoption of its lease by the reorganized company.

South Western's officers had been instructed by the stockholders at the annual meeting in March, 1944, to exhaust every effort to have South Western's lease with the Trustee adopted by the reorganized company. At no time did your officers negotiate with the Central's Trustee for a sale of South Western's property. All of their energies were concentrated on having South Western's lease adopted by the Interstate Commerce Commission in its plan of reorganiza-
[fol. 117] tion of the Central, as instructed by the stockholders.

It was not until the annual stockholders' meeting of March, 1945, that your officers were authorized to sell or lease South Western's railroads on more advantageous terms than those offered in the plan of reorganization of the Central then proposed by the Examiner of the Commission to the full Commission for its approval.

Your officers fought the plan of reorganization of the Central submitted by its Trustee, Mr. Merrell Callaway, in its application to South Western Railroad, every step of the way—before the Examiner, before the Interstate Commerce Commission, and then before the District Court for the Southern District of Georgia. Both the Commission and the Court found, over the strenuous and articulate objections of your officers, that the value placed upon South Western's physical properties in the plan of reorganization was fair and equitable to South Western's stockholders and to the mortgage creditors of the Central.

So the proposed price to be paid for South Western's physical properties under the terms of the approved plan of reorganization of the Central was not determined by free, unhampered negotiations between the parties to the proposed sale, but was fixed by the Commission, in the exercise of a sound business judgment, in pursuance of the authority given to the Commission by the Congress of the United States and by the decisions of the United States Supreme Court, and was then approved by the Judge of the District Court for the Southern District of Georgia as fair and equitable.

No appeal was taken by your officers from the order of the District Court approving the plan of reorganization, because an appeal would have been futile and would

have involved a substantial but useless expense to the South Western, for the reason that in order to reverse the judg- [fol. 118] ment of the District Court approving the plan, the South Western would have had to show that the Commission its consent to the proposed sale or lease, and to exercise a sound business judgment in refusing to adopt South Western's lease and in requiring South Western to accept the allocation of securities of the new company in payment for its physical properties or else have its lease rejected and take its properties back; and further South Western would have had to show that the District Court abused its discretion in approving the Commission's plan.

South Western, in the opinion of its counsel, did not have a possible chance of making such a showing on appeal.

Since the stockholders' meeting of March, 1945, your officers have been diligent in their efforts to find a lessee or purchaser of South Western's railroads on terms more attractive than those contained in the Commission's plan of reorganization, but have been unable to secure an offer from any substantial interest.

Had your officers been able to secure a better offer, before delivery of South Western's property could be made it would have been necessary to first secure from the Commission its consent to the proposed sale or lease, and to obtain from the Commission a certificate of abandonment by the Central's Trustee of operation of South Western Railroad and a certificate of public necessity and convenience for the operation of South Western Railroad by the purchaser or the new lessee. It is by no means certain that the Commission would have issued these certificates even if your officers had been successful in securing a purchaser or a lessee.

[fol. 119] This is the first of a number of letters the Board of Directors will send the stockholders in reference to its recommendation that the Commission's plan of reorganization be accepted and the alternatives to acceptance of this plan.

Respectfully yours, Anton P. Wright, President.

EXHIBIT

Office of The South Western Railroad Company, 404 Bankers Insurance Building, Macon, Geoggia

April 11, 1947.

To the Stockholders of South Western Railroad Company:

For the information of the stockholders, I enclose herewith a statement of earnings of the South Western Railroad as determined by the application of various segregation formulae in effect at the time to South Western's operations while under lease to the Receiver of the Central of Georgia Railway Company, from August 1, 1933, to June 19, 1940, when the Central filed its petition for reorganization in bankruptcy. This statement shows the amount of rental paid by the Receiver of the Central to South Western during this period. It also shows the earnings of the First Mortgage and the Consolidated Mortgage lines of the Central as determined by an application of the same formulae for the same period to the operations of these lines, and the payments made by the Receiver of the Central to the bondholders of such lines during the same period.

You will observe that during this period of almost seven years South Western operated at a total deficit of $1,256,341, [fol. 120] while receiving in rentals from earnings of the mortgage lines $2,159,425. These figures mean that the cost of South Western's lease to the Central during this period was $3,415,766.

South Western Railroad was operated by the Central's Bankruptcy Trustee from June 19, 1940, until July 1, 1943, for the account of South Western. The Central's Trustee during this period of three years and eleven days operated South Western's properties under a segregation formula allocating revennes and expenses between the leased lines and the mortgage lines of the Central, and not on a fixed rental basis. This formula was the subject matter of expensive litigation before the Commission between the leased lines and the mortgage lines of the Central. It was determined by the Commission and approved by the District Court and applied for the three-year-and-eleven-day period.

South Western's earnings under this segregation formula for the period June 19, 1940, to July 1, 1943, were as follows:

Six months and 11 days ended December 31, 1940	$99,948 (Deficit)
Year 1941	260,145
Year 1942	979,777
Six months of 1943	1,556,571

The figures set out in this letter and in the statement enclosed, with respect to the earnings of South Western Railroad, were admitted in evidence at the hearing before the Interstate Commerce Commission on the Trustee's plan of reorganization of the Central. They were considered and acted upon by the Commission in its refusal to adopt South Western's lease in the Commission's plan of reorganization, and in arriving at the amount of the First Mortgage and Income Bonds of the reorganized company [fol. 121] to be allotted to South Western for the acquisition of its properties.

The stockholders have been told by Mr. L. O. Benton, Jr. that your railroad is worth $9,500,000. This statement is evidently based upon the valuation of South Western's road and equipment property, shown as $9,523,736.81 in the general balance sheet on page 4 of the annual report to the stockholders dated March 13, 1947.

An increased valuation of road and equipment property first appeared in the annual report to the stockholders of March 9, 1944. The increased valuation represents a write-up on the books of the company for excess profits tax purposes of the Company's invested capital in the amount of $4,247,661.27. This write-up reflects the depreciated value of all additions and betterments chargeable to capital account made by South Western's lessees on South Western's railroads from December 1, 1869, to March 13, 1913, the effective date of the Federal Income Tax Act.

So long as South Western's properties were under lease South Western was not subject to the excess profits tax law. Under the terms of the lease the lessee paid all of South Western's taxes, ad valorem, income, and pay roll, including Federal income taxes on its annual income. The Commissioner of Internal Revenue has consistently taken the position that under the provisions of the lease taxes paid

by the lessee for South Western on South Western's rental are a part of the rental received by South Western. In this position he has been sustained by the Courts.

The Commissioner of Internal Revenue computes South Western's rental income under the lease as follows:

Annual rental stipulated in lease	$259,555.00
Federal income normal and surtax, 40%	103,822.00
Total rental income subject to tax	363,377.00
[fol. 122] Federal income tax, normal and surtax, on total rental	145,350.80
Cost to lessee, rental and Federal income tax	404,905.80

The excess profits tax law allowed a corporation, as a credit against excess profits tax income, 8% on the first $5,000,000 of invested capital and 7% on the next $5,000,000, which gave South Western a credit on its invested capital, before the write-up, of $413,377, an amount in excess of its annual rental as computed by the Commissioner of Internal Revenue.

From June 19, 1940, to July 1, 1943, South Western Railroad was operated by the Trustee for the account of the South Western under the lease as amended by the agreement of September 13, 1940. This agreement was authorized by the stockholders at a meeting held on August 13, 1940, the stockholders having been fully informed of the terms of the agreement by letter from the Directors dated August 8, 1940.

For the full year 1942 and the first six months of 1943 South Western had very large net earnings, which were subject to the 90% excess profits tax. South Western had never capitalized the additions and betterments made to its physical properties, properly chargeable to capital account, during the years its railroads were under lease, but carried on its books its road and equipment property at the original cost of $5,191,100, the amount of its outstanding capital stock. This amount, as stated, was written up $4,247,661.27, covering the depreciated value of these additions and betterments, for the purpose of increasing South Western's credit against its excess profits net income approximately $300,000.

This write-up of invested capital has not yet been allowed by the Federal income tax authorities and is the subject matter of controversy at this time. This explains the valua- [fol. 123] tion of $9,523,736.81 appearing in South Western's balance sheet as of December 31, 1946.

To this date South Western has paid in State and Federal income and excess profits taxes for the calendar years 1941, 1942, and 1943 the following amounts:

	State	Federal
1941	$ 4,143.55	$ 90,004.65
1942	19,953.67	406,198.50
1943	27,850.42	896,263.84

The excess profits taxes paid were computed on an invested capital basis after the write-up of $4,247,661.27.

This valuation of road and equipment property of $9,523,736.81 has not the remotest relation to the fair market value of the South Western Railroad. If your railroad were in fact worth this amount, South Western stock would not be currently selling at around $63 a share.

Respectfully yours, Anton P. Wright, President.

[fol. 124]

Earnings of South Western Railroad as Determined Under the Various Formulae From August 1, 1933, to June 19, 1940, and Amounts Paid by Central of Georgia Railway to South Western for This Period, Compared With Formulae Earnings of the First Mortgage and Consolidated Mortgage Lines, and Payments Made to Bond Holders of Such Lines During the Same Period.

Period	South Western Railroad		First Mortgage Line		Consolidated Mortgage Line	
	Formulae Earnings (1)	Amounts Paid by Central of Georgia (2)	Formulae Earnings (3)	Paid to Bondholders (4)	Formulae Earnings (5)	Paid to Bondholders (6)
5 Months to 12-21-33 (D)	$100,508	$121,695	$185,652	$ Nil	$73,288	$ Nil
1934 (D)	157,530	306,119	585,824	"	210,898	"
1935 (D)	143,046	307,906	742,097	"	252,070	"
1936 (D)	102,973	311,570	922,646	175,000	578,614	"
1937 (D)	158,375	314,296	649,396	350,000	141,171	"
1938 (D)	266,805	320,674	459,654	Nil	152,691	"
1939 (D)	238,669	324,748	608,260	"	191,395	"
1940 (to June 19) (D)	88,435	152,417	332,325	"	125,743	"
Total (D)	$1,256,341	$2,159,425	$4,485,854	$525,000	$1,725,870	$ Nil

(D) *Denotes Deficits.*

[fol. 125] EXHIBIT

Office of The South Western Railroad Company, 404 Bankers Insurance Building, Macon, Georgia

April 17, 1947.

To the Stockholders of the South Western Railroad Company:

South Western Railroad Company is now, and has been since July 1, 1943, operated by the Central's Trustee under the terms of the original lease of October, 1895. This lease was adopted on July 1, 1943, for the duration of the bankruptcy of the Central, upon the insistence of your Directors.

Notwithstanding unprecedented earnings during the war years 1942 and 1943, with resulting unprecedented income and excess profits taxes thereon, your Board was unanimous in its opinion that adoption of South Western's lease pending the reorganization of the Central would remove the hazard of operation for the account of South Western and would guarantee the security of the stockholders during the post-war period against any unforeseeable increase in expense of operation or slump in revenues.

Moreover, it was the thought of your Directors that if South Western should fail to sustain the write-up of its invested capital for excess profits tax purposes, then, even if net earnings should continue for the duration of the war on the level of the first six months of 1943, South Western, after paying the 90% excess profits tax, plus the normal and surtax, on its earnings, would be but little better off financially than it would be under the lease with the lessee paying its rental and all taxes thereon.

[fol. 126] The lure of increased earnings over and above the rental and taxes under the lease did not, in the opinion of your Board, justify the risk of continued operation for the account of South Western.

Support is found for the judgment of your Board in pressing for the adoption of the lease in the report of the Central's Comptroller, showing estimated formula earnings of South Western for the year 1946 to be a deficit of $442,754.

Under the provisions of the Interstate Commerce Act and of the Bankruptcy Act and the decisions of the Su-

preme Court of the United States, the Interstate Commerce Commission has exclusive control of the destiny of the South Western Railroad. In its order in the Central reorganization providing for the acquisition of South Western Railroad by the reorganized company, it is provided that the conveyance of South Western's properties to the new company shall be on the sole consideration of the delivery to South Western of the First Mortgage and Income Bonds of the new company allotted to South Western in the plan or reorganization. If the reorganization managers of the new company desired to make South Western a better offer than that contained in the Commission's plan, they are forbidden to do so by the Commission's order.

Under the decisions of the Supreme Court of the United States in Smith vs. Hoboken Railroad, Warehouse & Steamship Co. and in Thompson vs. Texas-Mexican Ry. Co., both decided April 29, 1946 (since the Commission's order recommending the plan of reorganization), the Commission now has the authority, in the public interest, to retain South Western's properties in the Central system and to fix a reasonable rental therefor, regardless of the consent of South Western's stockholders.

Your Directors recognized the potential danger to South Western in these decisions. In substance they give [fol. 127] the Commission the power to say to owners of leased railroads that their rights as owners must yield to the public interest.

If for any cause the Commission's plan of reorganization should fail of consummation, the reorganization Court may then send the plan back to the Commission for reconsideration and revision. The Court has no power to modify the Commission's plan. It must either accept or reject the plan in toto or dismiss the bankruptcy proceeding.

Should the plan go back to the Commission, the Commission could, in the exercise of its power in the public interest, retain South Western in the Central system and fix a fair and reasonable rental for its railroads. In view of the fact that the Commission, after a careful consideration of all factors affecting the value of South Western to the Central system, has already placed a value on its properties of $3,970,000 in bonds of the new company at par value, it is reasonable to assume that the Commission

would fix as a rental for South Western's railroads an amount not exceeding 3 percent upon South Western's outstanding capital stock. It retained in the Central system upon this lease basis, after payment of taxes by South Western on such rental, the net to the stockholders would be less than $2 per share per annum.

The alternatives to acceptance of the Commission's plan of reorganization of the Central are: First, to apply to the Commission for a certificate authorizing the Central's Trustee to abandon operation of South Western and to undertake independent operation of South Western's properties; and, second, to request the Court to require the new company to operate South Western's railroads for the account and at the risk of South Western, as provided in the Bankruptcy Act.

Assuming that the Commission, upon South Western's application, would issue a certificate of abandonment authorizing the Central's Trustee to deliver over South [fol. 128] Western's railroads to its owners for independent operation by them, the question of operating personnel and necessary rolling stock and equipment immediately presents itself. It is estimated that modern equipment necessary for an independent operation, consisting of road engines, switch engines, passenger train cars of various types, freight train cars, and wrecking equipment, would cost approximately $10,000,000; and this would not include roadway machines, materials, working capital, nor shops.

A decision against independent operation necessarily would result in the operation by the new company of South Western's properties at the risk and for the account of South Western under a segregation formula, which would be established by order of the Commission. Any deficit incurred in this operation would be a paramount lien upon all of South Western's properties in favor of the new company.

Your Board adheres to its view that either type of operation of your property involves too great a risk to the interest of the stockholders to be seriously considered.

This letter concludes the report to the stockholders summarizing the facts which impelled your Board to recommend acceptance of the Commission's plan of reorganization of the Central.

At the adjourned annual meeting of the stockholders, held at Macon, Georgia, on the 28th day of March, 1947,

the vote on the resolution to accept the plan of reorganization of the Central with reference to the acquisition of South Western Railroad by the reorganized company was 30,137 shares in favor of the resolution and 9,057 shares against the resolution.

Respectfully yours, Anton P. Wright, President.

[fol. 129] EXHIBIT

Findings of Fact

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE MACON DIVISION OF THE MIDDLE DISTRICT OF GEORGIA

At Law No. 623

THE SOUTH WESTERN RAILROAD COMPANY, Plaintiff,

vs.

UNITED STATES OF AMERICA, Defendant

I find the facts to be as follows:

(1) The plaintiff is a railroad corporation chartered by the General Assembly of Georgia, with its principal place of business within the Macon Division of the Middle District of Georgia.

(2) The operation of a railroad for the transportation of persons and property for hire was the sole object of plaintiff's incorporation.

(3) The lease of October 17, 1895, was made in pursuance of legislative sanction.

(4) Under the terms of said lease all of plaintiff's railroads and all of its property connected therewith were delivered over to the Central of Georgia Railway Company, and since then have been in the exclusive possession of and have been operated by the lessee company and its receiver, and plaintiff has taken no part in the management or operation of its railroads and its property, nor exercised any supervision thereof.

(5) Since the execution of the said lease of October 17, 1895, plaintiff has maintained its corporate existence and corporate organization by the annual election of a president and a board of directors, and the board of directors has [fol. 130] annually elected a vice-president and secretary and treasurer and a general counsel. Plaintiff has paid a salary to its president and its secretary and treasurer, and semi-annually since the execution of said lease has distributed the rental received from its lessee, in a sum equivalent to five per cent. of plaintiff's capital stock, among its stockholders. Plaintiff has no other agents, employes, or clerks. The expenses of maintaining plaintiff's corporate existence, as well as all of plaintiff's taxes, State and Federal, ordinary and extraordinary, have been paid by plaintiff's lessee.

(6) Since the execution of said lease of October 17, 1895, plaintiff has never contributed a dollar, by investment, loan, or otherwise, to the operation of the leased property; has never incurred any expense or obligation in the operation, maintenance, improvement, or extension of the leased property; nor has plaintiff exercised the right of eminent domain or put into force any special corporate power to aid the business of its lessee; nor has it pledged its credit for the benefit of its lessee in the operation of the leased property.

(7) Plaintiff has a contingent fund, which at the time of the execution of the lease of October 17, 1895, amounted to approximately $90,000. This fund and the income therefrom has been, from time to time since October 17, 1895, invested and reinvested by plaintiff in stocks and bonds, the market value of which on December 31, 1935, was $217,013.71. As certain securities in which this contingent fund was invested matured, the funds received in payment thereof were reinvested in other securities; and whenever it was considered advisable to change an investment, securities were sold and the proceeds of such sales were reinvested.

[fol. 131] (8) Since the imposition by the Congress of the United States of an excise tax upon domestic corporations with respect to carrying on or doing business plaintiff has annually filed a return required by such Acts, in which it claimed exemption from the tax on the ground that it was not carrying on business within the meaning of the appli-

cable revenue statutes. This claim for exemption so made by plaintiff was considered and sustained by the Commissioner of Internal Revenue for each and every year, to and including the year ended June 30, 1935.

(9) There was no change during the taxable year ended June 30, 1936, in the status of plaintiff from that existing in prior years in which said returns were made with respect to carrying on business.

(10) The other relevant facts I find to be as set forth in the agreed statement of facts in this case.

(11) Plaintiff is entitled to have and recover of the defendant a judgment in the principal sum of $3310.51, with inter-st thereon at the rate of six per cent. per annum from the 12th day of June, 1937.

Conclusions of Law

(1) This Court has jurisdiction of this case under the provisions of Title 28, Sect. 41 (20) and Title 28, Sect. 72, U. S. Code, it being a suit for the recovery of an internal revenue tax alleged to have been erroneously and illegally assessed and collected, and is required to try this case without a jury.

(2) From the facts found I conclude that the plaintiff is a non-operating railroad corporation which has reduced its [fol. 132] activities to maintaining its corporate existence and collecting the interest and dividends from the investment of its reserve fund, and distributing to its stockholders rental received from its lessee, and to doing only those acts which are necessary to continue that status.

(3) Under the facts found the maintenance by plaintiff of its reserve fund and the purchase and sale of securities held in this fund from time to time does not constitute carrying on or doing business within the meaning of Sect. 105 of the Revenue Act of 1935.

(4) During no part of the taxable year ended June 30, 1936, was plaintiff carrying on or doing business within the meaning of Sect. 105 of the Revenue Act of 1935.

(5) Plaintiff's corporate activities are confined to the owning and holding of property and the distribution of

its avails to its stockholders, and to doing only the acts necessary to continue that status.

(6) The tax sought to be recovered by plaintiff in this case was illegally assessed and collected from plaintiff, and by reason thereof plaintiff is entitled to a judgment against the defendant for the amount of the tax so illegally assessed and collected from plaintiff, with interest thereon at six per cent. per annum from the date said tax was paid.

JUDGMENT

Whereupon, It Is Considered, Ordered And Adjudged that plaintiff herein, The South Western Railroad Company, do have and recover of the defendant herein, the United States of America, the principal sum of $3310.51, [fol. 133] besides interest thereon at the rate of six per cent. per annum from the 12th day of June, 1937.

So ordered and adjudged this 14 day of January, 1938.

Bascom S. Deaver, United States Judge.

EXHIBIT

GEORGIA,
Bibb County:

To the Superior Court of said County:

The petition of L. O. Benton, Jr., and of Charles J. Haden, respectfully shows to the Court:

1

As stockholders in The South Western Rail Road Company, they bring this action against the Company, its officers and directors, on behalf of themselves and others similarly situated who may care to intervene.

2

The South Western Rail Road Company is a corporation having its principal office and place of business in Bibb County, Georgia. It is herein named as a defendant.

3

It was incorporated by an Act of the General Assembly of Georgia approved December 27, 1845, which Act and amendments thereto accepted by it, constitute its charter.

[fol. 134]

4

Anton P. Wright of Chatham County, Georgia, is President of the defendant Company. He is named as a defendant herein.

5

Wallace Miller of Bibb County, Georgia, is Vice President of the defendant Company. He is named as a defendant herein.

6

Andrew J. Lyndon is Secretary and Treasurer of the defendant Company. He is a resident of Bibb County, Georgia, and is named as a defendant herein.

7

The present Directors of the defendant Company, besides the officers hereinabove, are Remer Y. Lane of Chatham County, Georgia; Herschel V. Jenkins of Chatham County, Georgia; H. Wiley Johnson of Chatham County, Georgia; B. J. Tarbutton of Washington County, Georgia; and Charles G. Woodward of the State of Connecticut. Each of the directors is herein named as a defendant.

8

The original charter of the defendant company, as evidenced by the aforesaid Act of 1845, was several times amended by the General Assembly of Georgia prior to the General Railroad Incorporation Act of 1892. Each of the amendments was accepted by the defendant company. [fol. 135] No amendment to its charter made any provision as to the sale of its railroad properties, and its charter is silent with respect thereto. Therefore, the right to sell the entire properties of the Company is governed by the general law as it existed at the time of the grant of the charter and the amendments. Under that general law, a majority of the stockholders are not empowered to sell the properties of the Company.

9

The defendant corporation is a prosperous, going corporation, able to achieve the objects of its corporation, and neither its officers nor a majority of its stockholders have a right to sell its corporate property, or so much thereof as

may prevent the continuance of its business as a corporation and the carrying out of the purposes of its formation.

10

The present capital stock of the defendant Company is $5,191,100.00, all of which is represented by common stock. Its properties are free from mortgage or other liens. It owes no bonded indebtedness. Its current indebtedness on December 31, 1946, was $212,610.33, most of which has now been paid. Its current liabilities are less than $100,000.00.

11

The capital stock aforesaid is represented by 51,191 shares; 50,471 of these shares are outstanding in the hands of the public.

[fol. 136]

12

According to the report of the Board of Directors of the defendant Company submitted to the 100th annual convention of stockholders of the Company, held in Macon, Georgia, on March 13, 1947, its road and equipment property are worth $9,523,736.81.

13

Its common stock has a book value, therefore, in excess of $180.00 per share, based on fixed assets alone.

In 1942, the Interstate Commerce Commission valued the road and equipment property at $12,830,257.00. According to this valuation, its common stock would have a value, based on fixed assets alone, of approximately $240.00 per share.

14

The South Western Railroad comprises some 340 miles of railroad, bridges, depots, and appurtenances thereto, in the heart of the System of the Central of Georgia. Emanating from Macon, the lines of the South Western form that part of the Central of Georgia System extending from Macon through Fort Valley to Columbus; from Macon through Fort Valley to Americus, Smithville, Albany, and Columbia, Alabama. There joins with the latter line at Smithville, a branch which extends from Smithville to Eufaula, Alabama. Without the South Western, the Central of Georgia could not operate trains from Florida

through Macon to the north and west. Without the South Western, the Central could not operate trains from the coal fields, which it touches at Birmingham and vicinity, to Savannah and the coast. Without the South Western, the Central would have no line from Macon to Montgomery, Alabama.

[fol. 137]

15

On December 19, 1932, the defendant Company was being operated by the Central of Georgia Railway Company under a long term lease, which produced to the South Western a rental sufficient to pay stockholders an annual dividend of five per cent. The annual rental was $259,550.00 and taxes and organization expenses.

16

On that date, December 19, 1932, in an equity cause entitled Alabama Fuel & Iron Company, complainant, v. Central of Georgia Railway Company, defendant, pending in the United States District Court for the Southern District of Georgia, H. D. Pollard was appointed Receiver of the property and assets of the Central of Georgia Railway Company.

17

The said Receiver continued to operate the properties of the Central of Georgia Railway Company and continued to operate the South Western Rail Road under lease until June 19, 1940, at which time the Central of Georgia Railway Company filed its petition in the District Court of the United States for the Southern District of Georgia, stating that it was unable to meet its debts as they matured, and that it desired to file a plan of reorganization under the provisions of Section 77 of the Federal Bankruptcy Act.

Thereafter, in conformity with the Act, on August 9, 1940, H. D. Pollard and A. B. Lovett were appointed Trustees.

[fol. 138]

18

The said Trustees have thereafter continued to operate the business of the Central of Georgia Railway Company, subject to the control of the District Court and subject to the jurisdiction of the Interstate Commerce Commission, except that A. B. Lovett resigned as co-Trustee and was

succeeded by Merrel P. Callaway. Thereafter H. D. Pollard died, and Merrel P. Callaway continued to act as the remaining Trustee, and was confirmed as sole Trustee on April 20, 1942, and has since acted as sole Trustee of the property of Central of Georgia Railway Company.

19

As such, he has continued to operate the lines of the South Western Rail Road under lease, and on October 21, 1943, he adopted for the duration of the bankruptcy the South Western lease.

20

On January 28, 1944, the Trustee aforesaid, Merrel P. Callaway, filed his plan of re-organization with the District Court of the United States for the Southern District of Georgia, and contemporaneously therewith filed it with the Interstate Commerce Commission, pursuant to the provisions of the Bankruptcy Act. Subsequently, this plan was amended.

21

With respect to the South Western, the plan provided: "Prior to or upon consummation of the plan, the debtor shall also acquire, if they can be acquired on the terms [fol. 139] hereinafter set forth, properties at present leased to the debtor by the South Western Rail Road. . . . If any of these properties shall not be acquired as a result of the acceptance of the plan by the leased-line security holders, then and in that event the lease or leases of any line or lines not so acquired shall be disaffirmed as of such time at or prior to the consummation of the plan as the Court may direct. The method of acquisition, whether through purchase, merger, or consolidation, shall, subject to the approval of the Commission and the Court, be determined by the Trustee or by the re-organization managers when they begin to function. If the leased lines are acquired, the railroads of each of the three and the personal property appurtenant thereto and all the real estate owned by each lessor, shall be conveyed to the reorganized company; each of said lessors shall waive any damages to which it has become or shall become entitled on account of any breach of lease; and the South Western Rail Road Company shall waive all claims in respect to equipment. Such conveyances

and waivers shall in each instance be the sole consideration of the delivery to each of the respective lessors of the securities proposed to be allocated to it as hereinafter specified".

"The debtor" referred to herein is the Central of Georgia Railway Company.

22

The securities proposed to be allocated to the holders of South Western Rail Road Company capital stock referred to in the above quoted portion of the plan, were provided for in the plan as follows: "Holders of South Western Railroad capital stock would receive for each $1,000.00 of stock, $423.80 in new first mortgage Series [fol. 140] A bonds, and $340.97 in new income mortgage Series A bonds" of the proposed re-organized company.

23

The proposed new first mortgage bonds would be secured by the first lien, subject as to equipment to the liens of equipment obligations, on all railroads owned by the re-organized company on consummation of the plan, including leaseholds and capital stocks of terminal companies. They would also be secured by a similar lien on the stock of the Ocean Steamship Company and certain other securities and property, and the mortgage securing them would contain an appropriate after acquired property clause.

24

The new income mortgage bonds would be secured by a lien, subject to the lien of the first mortgage bond, upon all property from time to time subject to the lien of that mortgage.

25

There would be presently issued, under the plan, $14,000,000.00 of Series A first mortgage bonds, and $16,000,000.00 of Series B income mortgage bonds.

26

Under the plan, of these first mortgage bonds of the proposed new corporation, there would be issued to the South Western stockholders approximately $2,100,000.00 thereof, and of the income bonds approximately $1,700,-

[fol. 141] 000.00 thereof, a total of approximately $3,700,000.00 of bonds for property worth in excess of $9,500,000.00.

27

Almost immediately after the publication of this plan, the stockholders of the South Western Rail Road Company met in annual meeting at Macon, Georgia, on March 9, 1944, and passed a resolution which included the following provisions: "Resolved by the stockholders of the South Western Rail Road Company that the terms of the purchases proposed by the Trustee are hereby declared to be grossly unfair and inadequate to South Western Rail Road and are hereby unhesitatingly rejected."

28

At this meeting on March 9, 1944, there were represented 27,286 shares of the outstanding capital stock of the defendant Company. The resolution aforesaid was presented by Mr. Anton P. Wright, then and now President of the South Western, and upon motion of Dr. W. G. Lee, duly seconded, was unanimously adopted with the exception of the dissenting vote of one stockholder who owned 100 shares of stock.

29

At the next annual meeting of the stockholders of the South Western, held on March 8, 1945, 23,784 shares were represented. At that meeting, a resolution was adopted providing that the resolution of 1944 meeting, heretofore set out, be reaffirmed. The same stockholder owning 100 shares was the only dissenter. The resolution, re-affirming the position of the stockholders, was therefore adopted [fol. 142] unanimously with the exception of this one dissenting vote.

30

Thereafter, on July 28, 1945, there was held a call meeting of the Board of Directors of the South Western. There were present at that meeting only officers and Directors Wright, Miller, Jenkins, Johnson, and Lyndon. Absent were Messrs. Woodward, Tarbutton, and Lane. The following is an excerpt from the minutes of that meeting: "President Wright presided at the meeting and stated that its primary purpose was to consider the decision of the Inter-

state Commerce Commission in connection with the plan of re-organization of the Central of Georgia Railway Company."

It was decided that if the plan is approved by the Judge of the District Court, a meeting of the stockholders of the South Western Rail Road Company would be called. Accompanying each proxy sent to the stockholders would be a letter prepared by Messrs. Wright and Miller, setting forth in detail why the Board was recommending to the stockholders that the offer be rejected. In addition, the letter would state that it was the intention of the holders of the proxies to vote against the acceptance of the offer".

31

The plan was approved by the Judge of the District Court on June 25, 1946. No meeting of the stockholders of South Western Rail Road Company was called. The next meeting of the stockholders of the Company after the approval of the plan by the District Court Judge was held in Macon, Georgia, March 13, 1947. Accompanying [fol. 143] each proxy sent to the stockholders prior to that meeting, there was no letter setting forth in detail why the Board was recommending to the stockholders that the offer be rejected. There was no letter stating that it was the intention of the holders of the proxies to vote against the acceptance of the offer; but, on the contrary, actions were taken by the Directors which will be hereinafter stated.

32

On March 14, 1946, there was an annual meeting of the stockholders. At this meeting, 24,342 shares of stock were represented. This meeting was prior to the approval of the plan by the District Judge. To that meeting, the Directors submitted a report stating: "The stockholders of this Company, in meeting assembled, and upon two occasions, have rejected the price offered for their property in the plan of re-organization. The offer for that property, in the opinion of your Directors, is entirely inadequate, unfair, and unjust to the stockholders of this Company. The conclusions reached in the plan are based on misleading and unreliable figures, and seem to totally ignore the fact that the property of this Company is necessary and in-

dispensable to the successful operation of the Central System as a whole".

33

At this meeting of stockholders of March 14, 1946, the resolution adopted at the annual meeting of the stockholders held March, 1944, rejecting the Trustee's offer of purchase of South Western's properties, was unanimously reaffirmed.

[fol. 144]

34

On July 6, 1946, a call meeting of the Board of Directors of the South Western Rail Road Company was held at Macon, Georgia, at 9 A. M., Eastern Standard Time, in the private car of Merrel P. Callaway at the terminal station. Mr. Callaway is and was then Trustee of the properties of Central of Georgia Railway Company. Present at that meeting were officers and Directors Messrs. Wright, Miller, Jenkins, Tarbutton, Johnson, and Lyndon. Absent were Messrs. Woodward and Lane. The following is an excerpt from the minutes of that meeting: "President Wright presided and stated that the purpose of the meeting was to discuss the question of the action to be taken by the South Western Board in view of the approval of the Commission's plan of re-organization of the Central of Georgia, the South Western's lessee, by the District Court for the Southern District of Georgia, stating that the Court had approved the Commission's plan and had directed that the plan be submitted to the creditors for their approval. A general discussion ensued, in which all Directors participated. The decision was reached that it was not necessary for the South Western to take any action until the plan had first been approved by the creditors and was put up to South Western for acceptance or rejection".

35

So it is, therefore, that the Directors did not follow the plan which they had previously decided upon at their meeting aforesaid of July 28, 1945, of calling a meeting of stockholders of South Western Rail Road Company in the event of the approval of the plan by the District Judge, as hereinbefore set forth.

[fol. 145] 36

The officers and Directors of the South Western took no steps to appeal from the order of the District Judge approving the plan, although they had the right to appeal such decision to the United States Circuit Court of Appeals for the Fifth Circuit, and perhaps to the Supreme Court of the United States. The Directors have probably permitted the order of the District Judge to become final without any exception thereto.

37

And so it is, too, that although at said meeting of July 6, 1946, the officers and Directors decided that it was not necessary for South Western to take any action until the plan had first been approved by the creditors, they are now proposing, as will more fully hereinafter appear, that the South Western stockholders approve the plan prior to or contemporaneously with its acceptance or rejection by the creditors.

38

The next meeting of the Board of Directors was held in Savannah on January 25, 1947. All the Directors were present, except Director Woodward. The following is an excerpt from the minutes of that meeting: "President Wright presided and said that the primary purpose of the meeting was to decide what, if any, recommendation the Board would make to the stockholders were reference to either accepting or declining the offer made by the Trustee for the physical assets of South Western. After considerable discussion, it was decided that the Board would not take any action on this question at this meeting."

[fol. 146] 39

The next annual meeting of the stockholders of the South Western was held in Macon, Georgia, on March 13, 1947. To that meeting the Directors submitted a report in which the following was stated: "On February 11, 1947, the Interstate Commerce Commission passed an order in the Central of Georgia Railway Company reorganization requiring The South Western Railroad to accept or reject the provisions of the plan with respect to the acquisition by the new company of The South Western Railroad on or before the 28th day of March, 1947. Under the order of the Com-

mission a failure by The South Western to vote upon the plan as approved by the Commission and the Court within the period stated will operate as a waiver of the right to either accept or reject the plan.

"Your Board of Directors at its regular meeting immediately following the stockholders' meeting to be held on March 13, 1947, will take definite action with respect to the Commission's order, and recommend to the stockholders either an acceptance or rejection of the provisions of the plan as they affect The South Western Railroad, giving its reasons therefor. At that time your Board hopes to be able to advise the stockholders as to the value of the bonds of the reorganized company allocated under the plan to the purchase of The South Western Railroad.

"The stockholders will be promptly advised of the action taken by your Board of Directors upon the Commission's order, and it is proposed to hold an adjourned meeting of the stockholders on March 28, 1947, at which time every stockholder will be given the opportunity to vote, either in person or by proxy, upon the acceptance or rejection of the provisions of the plan with respect [fol. 147] to the purchase by the new company of The South Western Railroad."

40

Thereafter, on March 13, 1947, the annual meeting of the stockholders of The South Western Rail Road was held. No action was taken by the stockholders with respect to the plan and no recommendation was made to the annual meeting by the officers and Directors with respect thereto.

41

Upon the adjournment of the stockholders' meeting, a meeting of the Board of Directors was held at which all the officers and Directors were present with the exception of Directors Lane and Tarbutton. At that meeting of the Board of Directors, a resolution was passed, by the terms of which the Directors accepted the provisions of the approved plan of re-organization with respect to the acquisition of The South Western Rail Road Company, subject to the assent of said acceptance by the holders of a majority of the South Western Rail Road Company stock. A copy of this resolution is hereto attached, marked Exhibit A.

42

So it is, therefore, that although the stockholders had continuously since March, 1944, rejected this plan and although in every affirmative action taken with respect to it by the Directors, the Directors had also rejected the plan, suddenly, on March 13, 1947, the Directors approved the plan and proposed to submit it to a meeting of the stockholders to be held some fifteen days later.

[fol. 148] 43

Thereafter, under date of March 14, 1947, Anton J. Wright, President of the Company, addressed a letter to the stockholders, quoting from the plan and stating that under it each share of South Western Rail Road stock outstanding in the hands of the public would receive $42.4 par value of new first mortgage 4 per cent. bonds, and $34.1 par value of Series B 4½ per cent. income bonds. The letter stated that the Directors were unable even to tell the stockholders the market value of these new securities which they proposed to accept in lieu of South Western stock having a book value of more than $180.00 per share. There were figures in the letter which would have led a stockholder to believe that the market price of the bonds would be approximately $75.48.

44

The letter contained the following: "The situation in which the South Western finds itself is such that, though your "Directors still adhere to the opinion that South Western's value to the Central System is substantially greater than the amount offered for our property in the approved plan, yet a realistic view must of necessity be taken of South Western's present position and all factors affecting the interest of the stockholders carefully considered. Having taken such view, your Directors feel that in the exercise of the trust placed in them by the stockholders, they should recommend to the stockholders the acceptance of the provisions of the approved plan and re-organization with respect to the acquisition by the new Company of South Western's railroads."

[fol. 149] 45

Some of the Directors have expressed the view to one of your petitioners, that as Directors, they have recom-

mended the acceptance, but as stockholders they would oppose the sale. These Directors, however, have not made this view generally known to stockholders, who are laboring under the impression that the Directors have unqualifiedly recommended the plan.

46

In the President's letter of March 14, 1947, no real information was given which would enable a stockholder to arrive at an intelligent opinion as to whether it was advisable to accept or reject the plan. No information was given as to the amount of the earnings of the Central of Georgia on the South Western properties since 1943 when they assumed the lease. No statement was made as to the vital importance of the South Western to any re-organized corporation operating the present lines owned or leased by the Trustee of the Central. The stockholders of the South Western are over one thousand in number. There are very few large stockholders. They are scattered through nineteen States, the District of Columbia, and England.

47

The stockholders cannot possibly have the opportunity prior to March 28, 1947, intelligently to consider whether or not they should accept or reject the plan. Petitioner is advised and so charges that the present management of the Central of Georgia Railway has for the last week had out over Georgia representatives actively soliciting votes for the ratification of the plan.

[fol. 150] 48

On March 19, 1947, plaintiffs sent by registered mail to each of the individual defendants, a letter in which it was requested that the proposed meeting of the stockholders of March 28, 1947, be postponed for sixty days in order that the whole situation might be thoroughly presented to all the stockholders from its unfavorable and favorable angles. It was also requested that before any proposition of sale was submitted to the stockholders that another meeting of the Board of Directors be called at which the plaintiffs and others similarly interested might present their views both legal and factual.

49

The defendant officers and Directors have failed and refused to postpone the meeting of stockholders proposed to be held on March 28, 1947, although the stockholders and Directors had continuously over a three-year period from the filing of the plan up to March 13, 1947, almost unanimously opposed it in so far as it affected the South Western.

50

After three years of continuous rejection of the plan, suddenly, on March 13, 1947, the officers and Directors of South Western change their position and call a stockholders' meeting on notice to stockholders which is, at most, fourteen days' notice, to consider a matter which is most vital to their interests and the interests of the Company.

[fol. 151]

51

In the letter of the President of the Company to the stockholders, dated March 14, 1947, hereinbefore referred to, he also said: "Under the laws of Georgia, the assent of a majority of our stockholders is required to a sale or lease of our railroad properties. Should the stockholders desire to accept the offer to purchase the physical properties of our Company contained in the plan of reorganization, such acceptance must be authorized by a vote of a majority of the stockholders."

52

Your petitioners are advised and so charge that in his reference to the "laws of Georgia," the President of the Company was referring to Sections 94-328 and 94-329 of the Georgia Code of 1933, a copy of which Sections, for the convenience of the Court, is attached as Exhibit B.

53

Your petitioners aver that these sections are not applicable to the South Western, as disclosed by this suit, for the South Western, as disclosed by this suit, for the following reasons:

(a) The lease under which the properties of the South Western Rail Road Company are being operated, has not terminated:

(b) The terms proposed for the sale of the property were not agreed upon by the Board of Directors, but were forced upon them;

[fol. 152] (c) The phrase "another railroad corporation" in said sections means a presently existing, operating railroad corporation, and not one hereinafter to be formed;

(d) The sections contemplate the assent or agreement of all the members of the Board of Directors, and not merely a majority thereof. The terms have not been agreed upon by Directors Tarbutton and Lane, who were absent from the meeting of March 13, 1947;

(e) The sections were not intended by the General Assembly of Georgia to apply to the South Western Rail Road Company; were not intended by the Legislature to amend the charter of the South Western Rail Road Company; and, if so intended, have not been accepted as a part of the charter by the stockholders of the South Western Rail Road Company.

54

If, however, the aforesaid Sections 94-328 and 94-329 of the Georgia Code of 1933, should be construed by the Court to be applicable to the present situation of South Western, and the actions heretofore had by its Directors, the said sections could not regulate and govern a sale of the properties of the South Western Rail Road Company, as the sections would then be unconstitutional and void as being in violation of Article I, Section X, Paragraph I of the Constitution of the United States which provides: "No State shall . . . pass any . . . law impairing the obligation of contracts." The said sections, if construed to be applicable to the present situation of the South Western would also be unconstitutional and void as being violative of Article I, Section III, Paragraph II of the Constitution of the State of [fol. 153] Georgia of 1945, which provides: "No . . . law impairing the obligations of contracts . . . shall be passed."

55

The charter granted to The South Western Rail Road Company by the General Assembly of Georgia by the Act of 1845 and Acts amendatory thereof, accepted by the South

Western, is a contract between the State of Georgia and The South Western Rail Road Company and its stockholders, the benefits of which insure to the stockholders including your plaintiffs, and the obligations of which cannot be impaired by Sections 94-328 and 94-329 of the Code of Georgia of 1933, or any other Act of the General Assembly. For over one hundred years it had been constantly contended by the officers and Directors of The South Western Rail Road Company that its charter is a contract between it and its stockholders, on the one hand, and the State of Georgia, on the other, which could not be amended by subsequent legislation so as to impair its obligation.

So jealously have the officers, Directors, and stockholders of the Company guarded the provisions of its charter in the past that even during the War Between the States, they took the position that the Congre. of the Confederate States of America had no legal right to assess an income tax against the Company, and paid the tax while respectfully protecting that the Confederate authorities had no power to impose any tax on the Company.

56

But now, on fourteen days' notice, to one thousand stockholders scattered over the nation, the defendant officers and Directors have changed the position theretofore assumed [fol. 154] by them and their predecessors for over one hundred years as to the legality of legislation such as the Sections 94-328 and 94-329 of the Code of 1933 aforesaid.

57

And on fourteen days' notice to one thousand stockholders, the defendant officers and Directors have changed their position, steadfastly adhered to for three years, as to the advisability and permissibility of the sale under the terms aforesaid forced upon them by the plan.

58

Each of your petitioners was a stockholder of The South Western Rail Road Company at the time of the transactions of which they complain.

59

Petitioners have acted promptly. They have made an earnest effort to obtain redress at the hands of the officers

and Directors of the defendant Company, and will, at the first opportunity, if need be, make the same earnest efforts to obtain redress at the hands of the stockholders.

60

Your petitioners respectfully show that the defendant Company should be restrained and enjoined from holding the stockholders' meeting on March 28, 1947, and from submitting to such meeting the proposed plan to sell the railroad properties of the defendant Company, for the reason that if the stockholders should pass the resolution proposed to them as heretofore accepted, such action on the part of [fol. 155] the stockholders would be beyond the charter powers of the Company. The threatened action of the Directors in proposing to submit the plan to the stockholders is beyond the charter powers of the Company.

61

The action of the Board of Directors in disobeying the repeated and almost unanimous desires of the stockholders with respect to a sale of these properties, constitutes a strong case of mismanagement which should be enjoined by this Court of Equity.

62

Your petitioners have no adequate remedy at law and will be remediless unless this Court of Equity intervenes to protect them and other stockholders similarly situated.

63

Your petitioners are advised that the Interstate Commerce Commission has sent to the officers of the defendant Company a ballot which must be filled out, signed, and filed in duplicate with the Commission, signifying the acceptance or rejection by the South Western of the plan of re-organization, in so far as it affects it.

64

If this Honorable Court should not enjoin the holding of the stockholders' meeting, and a mere majority of stockholders should vote in favor of the acceptance of the plan and the resulting sale of all the railroad properties of the defendant corporation, such resolution or action of the stock-

[fol. 156] holders would be void, and officers and Directors should be restrained and enjoined from carrying such action of the stockholders into effect and should be specifically restrained and enjoined from filing with the District Court of the United States for the Southern District of Georgia, or with the Interstate Commerce Commission any acceptance of the plan, and should be specifically restrained and enjoined from selling to the re-organized company, or to any one else, or any other company, all of South Western's railroad properties, rights, and franchises, and should be specifically restrained and enjoined from executing any written instrument which might convey the fee-simple title to the property just mentioned unto the re-organized company, or any other company, and should be specifically restrained and enjoined from doing and performing any act in behalf of the South Western Rail Road which might tend to consummate the plan of re-organization of Central of Georgia Railway Company with respect to the acquisition of the South Western's railroads.

Wherefore, petitioners pray:

(a) That process may issue, requiring the defendants and each of them to be and appear at the Superior Court of Bibb County, Georgia, within the time prescribed by law, to answer this complaint;

(b) That the defendant officers and Directors of The South Western Rail Road Company be restrained and enjoined from holding a stockholders' meeting on March 28, 1947, and from submitting to such meeting the proposed plan to sell the railroad properties of The South Western Rail Road Company;

[fol. 157] (c) If this Honorable Court should not restrain and enjoin the holding of the stockholders' meeting, as herein prayed, and if at that meeting a mere majority of the stockholders should vote in favor of the acceptance of the plan and the resulting sale of all the railroad properties of the defendant corporation, that the officers and Directors of the defendant Company be restrained and enjoined from carrying such action of the stockholders into effect, and specifically that the officers and Directors be restrained and enjoined from filing with the District Court of the United States for the Southern District of Georgia,

or with the Interstate Commerce Commission any acceptance of the plan, and that the officers and Directors of the defendant Company be specifically restrained and enjoined from selling to the re-organized company, or to any one else, or any other company, all the defendant Company's railroad properties, rights, and franchises, and be specifically restrained and enjoined from executing any written instrument which might convey the fee-simple title to the property just mentioned unto the re-organized Company or any other company; and be specifically restrained and enjoined from doing and performing any act in behalf of the South Western Rail Road Company which might tend to consummate the plan of re-organization of Central of Georgia Railway Company with respect to the acquisition of the properties of The South Western Rail Road Company;

(d) For such other and further relief as to the Court may seem meet and proper.

(Sgd.) Hall & Bloch, Attorneys for Petitioners.

GEORGIA,
Bibb County:

Before me, an officer duly authorized by law to administer oaths, personally appeared L. O. Benton, Jr., who being duly [fol. 158] sworn, deposes and says that he is one of the plaintiffs in the case stated, and that the facts stated in the foregoing petition are true.

This 24 day of March, 1947.

(Sgd.) L. O. Benton, Jr.

Sworn to and subscribed before me, this 24 day of March, 1947. (Sgd.) Jos. W. Popper, Notary Public, Bibb County, Georgia. (Seal.)

EXHIBIT "A" TO PETITION

A resolution authorizing the sale of the railroad properties of the South-Western Railroad Company to the re-organized Central of Georgia Railway Company.

Whereas, the approved plan of reorganization of the Central of Georgia Railway Company provides that the

debtor shall acquire the properties presently leased to the debtor by South-Western Railroad Company by allocating to South-Western Railroad Company in payment therefor $2,138,972 in First Mortgage 4% Bonds of the reorganized company and $1,720,901 of 4½% Income Bonds, Series B, of the reorganized company, South-Western Railroad Company to convey to said reorganized company its railroads and all personal property appurtenant thereto, and all real estate owned by the Company and to waive all claims for damages to which it is or shall become entitled on account of any breach of its lease, and to waive all claims in respect to equipment; and

[fol. 159] Whereas, South-Western Railroad Company is a railroad corporation chartered by the General Assembly of Georgia, and has heretofore leased all of its railroad properties for a long term of years to the Central of Georgia Railway Company, which said lease will terminate upon the consummation of the plan of reorganization of the Central of Georgia Railway Company; and

Whereas, the lessor, South-Western Railroad Company, has leased its railroads to the Central of Georgia Railway Company and its predecessor in title, the Central Railroad & Banking Company of Georgia, since the year 1869, and is not a going concern, and is not equipped to conduct the operation of a railroad company; and

Whereas, The plan of Reorganization provides for the allocation to South Western Railroad Company, $2,200,000 First Mortgage Bonds, and $1,770,000 of Income Bonds Series "B". The Appendix No. 1 to the Plan provides for the distribution to the Consolidated Mortgage Bondholders of $61,028 of the $2,200,000 of First Mortgage Bonds (see note k to Appendix) and $49,099 of the $1,770,000 of Income Bonds (note 1 to Appendix), in view of the fact that $144,000 of the stock of the South-Western Railroad Company is owned by Central of Georgia Railway Company and is pledged under the Consolidated Mortgage. If only $2,138,972 of First Mortgage Bonds and $1,720,901 of Income Bonds is delivered to South-Western Railroad Company, then the $144,000 of South-Western Railroad Company stock, which is pledged under the Consolidated Mortgage, will not be entitled to participate in the liquidation of The South-Western Railroad Company in the $2,138,972 of First Mortgage Bonds and the $1,720,901 of Income Bonds; but

the said $144,000 of stock will be entitled to participate in [fol. 160] the distribution of other assets of The South Western Railroad Company in case of its liquidation.

Now, Therefore, Be It Resolved by the Board of Directors of the South-Western Railroad Company, at a special meeting of said Directors called for the purpose of taking definite action with respect to the acceptance or rejection by South-Western Railroad Company of the provisions of the approved plan of reorganization of the Central of Georgia Railway Company, that the provisions of the approved plan of reorganization of the Central of Georgia Railway Company with respect to the acquisition of The South-Western Railroad Company be accepted by South-Western Railroad Company, subject to the assent of said acceptance by the holders of a majority of South Western Railroad Company stock.

Be It Further Resolved that when it has been determined that a majority of the holders of South-Western Railroad stock has assented to the acceptance of the plan of reorganization of the Central of Georgia Railway Company, the proper officers of this company are authorized and directed, in carrying out the approved plan of reorganization, to sell to the reorganized company all of South-Western's railroad properties (including its real estate, but excluding cash and securities in its treasury), rights and franchises, as authorized by Section 94-328 of the Code of Georgia Annotated of 1933; and to execute such written instruments as may be necessary or appropriate to convey the fee simple title thereto to the reorganized company; and to do and perform such other acts in behalf of South-Western Railroad as may be necessary or desirable to fully consummate said plan of reorganization of the debtor with respect to the acquisition of South Western's railroads.

[fol. 161] EXHIBIT "B" TO PETITION

"94-328. Authority to Sell or Lease Railroad.—Any railroad corporation organized under the laws of this State, which has heretofore leased its property for a long term of years to another corporation, which lease has terminated, and the lessor is not a going concern or equipped to conduct the operations of a railroad company, is hereby authorized

to sell or lease its property, rights, and franchises to another railroad corporation upon such terms as may be agreed upon by the board of directors of the selling or lessor corporation and assented to by the holders of a majority of its stock. (Acts 1933, p. 235.)

94-329. Rights Acquired.—The railroad corporation to which a sale or lease is made under the terms of the preceding section, shall acquire all the property, rights, and franchises of the selling, or lessor, corporation. (Acts 1933, p. 235.)"

ORDER TO SHOW CAUSE

The foregoing petition, together with the prayers for extraordinary relief, read, considered, and sanctioned.

It is ordered that the defendants show cause before me at Macon, Georgia, on March 26, 1947 at 10:00 o'clock A. M. why they should not be enjoined as prayed in the petition.

In open Court, this 25th day of March, 1947.

(Sgd.) Mallory C. Atkinson, J. S. C. M. C.

[fol. 162] CITATION

STATE OF GEORGIA,
Bibb County:

To the Sheriff of Chatham County—Greeting:

L. O. BENTON, JR. & CHARLES J. HADEN

vs.

THE SOUTH WESTERN RAIL ROAD CO., ANTON P. WRIGHT, WALLACE MILLER, Andrew J. Lyndon, Remer Y. Lane, Herschel V. Jenkins, Wiley Johnson, B. J. Tarbutton & Charles G. Woodward

The Defendants are, hereby required personally or by attorney to be and appear at the Superior Court to be held in and for said County within 30 days from the date of service of the within petition upon each defendant as shown by entry of the serving officer set forth below, then and there to answer in writing the Plaintiff's Complaint, as in default thereof said Court will proceed, as to justice shall appertain.

Witness the Honorables Mallory C. Atkinson and A. M. Anderson, Judges of said Court.

This the 25th day of March, 1947.

(Sgd.) C. G. Sloan, Clerk.

To the Defendant Upon Whom This Petition is Served:

This copy of petition and process was served upon you on the day of , 19 .

, Sheriff of Bibb County.

[fol. 163] Copy

No. 11037

Bibb Superior Court, Civil Division, June Term, 1947

Complaint

Injunction

L. O. Benton, Jr. & Charles J. Haden

vs.

South Western Rail Road Co., et al.

2nd Original Chatham County

Filed in office, this 25th day of March, 1947.

(Sgd.) C. G. Sloan, Clerk. Hall & Bloch, Plaintiff's Attorneys.

State of Georgia,
Chatham County:

Sheriff's Office, Mar. 26, 1947

I have this day served the within petition and process on Defendants, Herschel V. Jenkins and H. Wiley Johnson, by handing each of them personally and individually a separate copy thereof.

The return of

(Sgd.) W. J. Ryan, Deputy Sheriff, Chatham Co., Ga.

[fol. 164] Due and legal service of the within petition and process acknowledged. Copy and copy process received. All further and better service waived.

This March 28, 1947.

Remer Y. Lane.

CITATION

STATE OF GEORGIA,
Bibb County:

To the Sheriff of Bibb County—Greeting:

L. O. BENTON, JR. & CHARLES J. HADEN

vs.

THE SOUTH WESTERN RAIL ROAD CO., ANTON P. WRIGHT, Wallace Miller, Andrew J. Lyndon, Remer Y. Lane, Herschel V. Jenkins, Wiley Johnson, B. J. Tarbutton & Charles G. Woodward

The Defendants are, hereby required personally or by attorney to be and appear at the Superior Court to be held in and for said County within 30 days from the date of service of the within petition upon each defendant as shown by entry of the serving officer set forth below, then and there to answer in writing the Plaintiff's Complaint, as in default thereof said Court will proceed, as to justice shall appertain.

Witness the Honorables Mallory C. Atkinson and A. M. Anderson, Judges of said Court.

[fol. 165] This the 25th day of March, 1947.

(Sgd.) C. G. Sloan, Clerk.

To the Defendant Upon Whom This Petition is Served:

This copy of petition and process was served upon you on the day of , 19 .

, Sheriff of Bibb County.

Filed in office, this 25th day of March, 1947.

Due & legal service of the within petition and order thereon acknowledged. Copies thereof received and further notice waived.

Wallace Miller, Counsel for South Western Railroad Co., Anton P. Wright, Andrew J. Lyndon, defendants.

BIBB SUPERIOR COURT

No. 11037

L. O. BENTON, CHAS. J. HADEN

vs.

SOUTH WESTERN RAILROAD CO.

RESPONSE TO PETITION

Mr. Miller: This is in the nature of a response. Responding to Plaintiff's petition in this case in behalf of the Southwestern Railroad Company, the defendant admits the allegations contained in paragraphs 2, 3, 4, 5, 6, 7, and with respect to paragraph 8, the defendant admits that its origi- [fol. 166] nal charter was granted by the General Assembly of Georgia in 1845, and was thereafter several times amended. These amendments were accepted by the Company and that neither the original charter nor any of the amendments made any provisions with respect to the sale of Southwestern Railroad. The balance of that paragraph is nothing more than a conclusion of law into which, of course, we do not agree. We take issue with the allegations that the right to sell the property of the Southwestern Railroad is governed by the general law as it existed at the time of the grant of the charter and the amendments. We also take issue with the allegation that under the general law, a majority of the stockholders are not empowered to sell the properties of the Company.

Answering paragraph 9 of the petition, the defendant denies that it is a prosperous, going corporation, able to achieve the objects of the Incorporation. We say, on the other hand, we are non-operating corporation, our profits being on what is usually referred to as perpetual lease to the Central of Georgia Railroad and specifically its receiver and Board of Trustees. The defendant Railroad has been under lease continuously since June 1, 1869; first, to the Central Railroad and Banking Company of Georgia and subsequently in the form of an amended and renewed lease to the Central of Georgia Railway Company and then to its Receivers and Bankruptcy Trustees. The lease has been adopted by the Bankruptcy Trustees for the duration of the bankruptcy. I might add that with respect to a going

concern the South Western Railroad Company has always claimed an exemption from the Federal Capital Stock Tax. This claim resulted in litigation with the Internal Revenue Department of the Government, who claimed that the Southwestern was a going concern, doing business within the means of capital stock tax. That question was litigated in [fol. 167] the Federal Courts and the claim of the Southwestern, with respect thereto, was sustained.

Answering this paragraph 19 of the petition further, this defendant says that the Act of the General Assembly of Georgia 1933, which is codified in the Acts of 1933, Title 94, section 328, authorizes this defendant with the assent of a majority of stockholders to sell or lease this property to another railroad corporation.

Answering paragraph 10 of the petition, the defendant admits that its outstanding capital stock is 51,911 shares with the par value of $100.00 each; that its properties are free from any form of debt; that it has no bonded debt; has no bank loans; has no preferred stock; has no equipment and obligations and that the current indebtedness referred to in this paragraph of plaintiff's petition is in the nature of a reserve setup for Federal income tax liability to the extent of $200,000.00. The current liabilities are practically nil.

Answering paragraph 11 of the petition, the defendant admits or has already stated that its outstanding stock consists of 51,911 shares in the hands of the public. The Central of Georgia Railway Company owns in its own name 1440 shares of Southwestern Railroad capital stock. These 1440 shares are pledged by the Central of Georgia Railway Company as additional collateral.

Answering paragraph 12 of the petition, this defendant says that in the report of its Board of Directors to the stockholders dated March 13, 1947, its road and equipment property as shown of December 31, 1946 is $9,523,738.81. This figure came about as a writer of Southwestern Railroad Company invested capital in the sum of $4,247,661.27. I think, perhaps, at this juncture I should explain what brought about that write up. The bankruptcy trustee, Mr. Callaway, operated the Southwestern property for the period June 19, 1940 to July 1, 1943 under an amendment [fol. 168] to the lease, whereby Southwestern Railroads were operated for the account of the Southwestern, as a measure of the rent payable under the amended lease. It

just so happened that the war came on about a year and a half after this amended lease contract was entered into and Southwestern had very large earnings during the year 1942 and 1943 and thereby was subject to the excess profit tax. We suffered from that tax for the reason that during the period upon which the tax is calculated we had the rental income of $259,000.00 for an 8% credit on the invested capital method of calculating the taxes on $5,191,100.00. It was my idea that we were entitled to include in our invested capital the additions and betterment made to our property throughout long years it had been under lease to the Central of Georgia Railway and its predecessor in title. The theory behind it was that the excess profit tax was supposed to give a corporation a reasonable return upon its invested capital and the original capital stock of the Southwestern could not possibly have earned the amounts it did earn subject to those taxes during the years 1941, 42, 43. So we calculated the value of additions and betterments of the Southwestern property up to the effect-ve date of an income tax, which I think was March 31, 1913 and arrived at the figure shown in this report. Of course, this figure does not represent fair market value of the property.

Answering paragraph 13 of the petition, the defendant admits that upon the basis of the value of its road and equipment set forth in the report dated March 13, 1947 at the figure of $9,523,736.81, the book value of the stock is as stated in the petition.

Answering the second paragraph of paragraph 13 of the petition, this defendant says that the Interstate Commerce Commission's valuation of South Western property as of December 31, 1942 on the basis of reproduction of the property less depreciation is the figure stated in the petition [fol. 169] $12,830,257.00 and based on this figure the book value of the defendant's stock would be as stated in the petition, I assume it would be, I have not calculated it.

Answering paragraph 14 of the petition, this defendant says that the allegations of this paragraph are true, save and except a statement that without the Southwestern the Central could not operate trains from Birmingham to Savannah. The fact is that the Central has a route out of Columbus, Georgia, to Savannah, which it could use without running over Southwestern rails. This road is through Columbus to Raymond, to Griffin, to Macon and to Savannah. This defendant says, however, that this route has

heavy grades and bad curves and from a practical economical operating standpoint the costs of this operation would be problematical to the Central of Georgia. The Central of Georgia has used for years as one of its primary main lines Southwestern's rails from Macon to Fort Valley to Columbus in handling all freight movements coming through the Birmingham gateway.

The allegations of paragraph 15 of the petition are admitted, and the allegations of paragraph 16 are admitted.

Also the allegations in paragraphs 17, 18, 19, 20 and 21 are admitted.

The allegations in paragraph 22 are also admitted with a slight correction in that the 4½% income bonds allocated to Southwestern are series B bonds instead of A. The only difference between A bonds and the B bonds is that the B bonds do not have the protection of the sinking funds. The security is the same, the rank in priority is the same with the A income bonds.

The allegations of paragraph 23 of the petition are admitted.

The allegations of paragraph 24 of the petition are admitted.

[fol. 170] Also, the allegations of paragraph 25 of the petition are admitted.

In answering paragraph 26 of the petition, the defendant takes issue with the allegation that the property is worth in excess of $9,500,000.00, that this allegation refers to its reasonable and fair market value, on a basis of the historical cost, less depreciation the property is valued at an amount in excess of $9,500,000.00.

The allegations of paragraphs 27, 28, 29 and 30 of the petition are admitted, subject to the explanation which I am now about to give:

This paragraph 30 of the petition refers to the meeting of the Board of Directors of the Southwestern on July 28, 1945. I am now addressing myself to paragraph 30 of the petition. I want to point out to Your Honor that there is no reference made in paragraph 30 of the petition or in 31 of the petition to a meeting of the stockholders of the Southwestern Railroad Company that was held at the principal office of the Company here in Macon in March of 1946. I might say at this time that although those annual reports of the Board of Directors to the stockholders are dated the date of the annual stockholders meeting, as a matter of

fact, they are all mailed out to the stockholders from two to three and sometimes four weeks in advance of the stockholders meeting so that all stockholders may be familiar with the contents of the report before they attend the meeting. In the report of the president, which is dated March 14, 1946 to the stockholders this final paragraph appears "Under the law our property cannot be sold or leased without the assent of the holders of a majority of our stock. Your Board has opposed the acceptance of the proposed terms of purchase until and unless, as a final resort, the lack of any other feasible plan of safeguarding the interests of the stockholders dictates the absolute necessity for its acceptance."

[fol. 174] Answering paragraph 31 of the petition this defendant says that it is not true that *that* no meeting of the Southwestern Railroad stockholders was called. It is true no special meeting of the stockholders was called. The meeting of the stockholders of the Southwestern Railroad, which was held on March 14, 1946, was the first meeting following the meeting of the Board of Directors referred to in paragraph 30 of the petition, which was held on July 28, 1945. It is true as alleged in paragraph 31 of the petition that a proxy was sent to the stockholders. There was no letter setting forth in detail why the Board was recommending to the stockholders why the offer be urged. The letter which was sent to the stockholders, dated March 14, 1946 set out what the plans of reorganization contained with respect to the acquisition of the leased lines. Also advising the stockholders "that the plan can not be put into effect until January 1, 1947, and not even then, if as has been threatened, an appeal is taken from an order of the Court approving the plan." A letter from the defendant's president dated March 14, 1946 advised the stockholders that the offer for their property, in the opinion of the Directors, was inadequate, unfair and unjust to the stockholders but it did put the stockholders on definite notice in the last paragraph of this letter that the Board might be, as a final resort, finally driven to the acceptance of the plan of reorganization.

What I have just stated is also in response to paragraph 32 of the petition which undertakes to set out what the directors reported to the stockholders but doesn't set out everything the directors set out as to the stockholders as

shown by the report. This is the same report previously referred to-date as March 14, 1946.

The allegations of paragraph 33 of the petition are admitted.

[fol. 172] In response to the allegations of paragraph 34 of the petition, I would like to state why the meeting referred to in this paragraph was held in a private car of the Central of Georgia at the Macon Terminal Station. There are eight directors of the Southwestern Railroad Company. In view of the fact that its charter provides that the president should be a director ex-officio, two of these directors live in Macon, four in Savannah, one in Sandersville and one in Hartford, Connecticut. During this long contest that the Southwestern had with the Central Receiver and Bankruptcy Trustee, there was quite a number of meetings of the directors called to be held in Savannah, which put the burden upon Directors Lyndon and Miller to make a trip to Savannah in and during the war years. Neither one of us had automobile tires in good enough shape to make this trip, so we had to go by rail; that meant, of course, that we got on the train at 2:30 in the morning and got off at that same hour so I finally said to Mr. Wright, "you are working us too hard, why don't you make Calloway let you have his car, it is a nice air conditioned car and you can bring the directors up here and have a meeting here and save us a trip down to Savannah". That is the reason the meeting was held in the car. It seemed a gracious and courteous thing for us to do, for us two to go down there rather than for all five of them to go to the Bankers Insurance Building. I want to state for myself personally that I resent the implication in the allegations of this paragraph, particularly in view of what I understand appears in the morning Telegraph. I didn't read it but Mr. Lyndon called my attention to it. This is a report of the Macon Telegraph of March 26, 1947 to the effect of this petition for injunction that "directors *turned the offer* down in at least two annual meetings, the plaintiffs charge that the plan was approved and recommended only after a meeting of officers and directors with Merrell P. Calloway, Central trustee, in his private railway coach in the Macon Terminal last July."

Mr. Bloch: We didn't allege that.

Mr. Miller: The suit does not allege that. I don't know where the reporter of that article got his information. It is

utterly untrue, as a matter of fact, I don't know whether it was the car of Mr. Calloway or Mr. Cummings. It was a car of the Central of Georgia Railway Company. Mr. Calloway was not at this meeting and no representative of the Central of Georgia was at the meeting. It was simply a matter of courtesy on the part of the Central's bankruptcy trustee in permitting the use of his car or the car assigned to him by the Savannah directors. The Southwestern took some of the burden of these trips. I think it was at that meeting that Mr. Torbett, one of our directors gave us great hope that he would be able to sell Southwestern property to some Georgia institution that was interested in it, with whom he expected himself to be associated and we authorized him at that meeting to see if he could petition a firm offer from a responsible purchaser at a price of $80.00 a share for Southwestern stock. I remember distinctly at that meeting the question came up as to whether this proposed interest might acquire a majority of our stock and the director said, "No, any price that was offered for the stock whether $80.00 or a lesser sum should be offered every other stockholder of the Southwestern on the basis of absolute equality."

In response to paragraph 35 of the petition, the reason a special meeting of the stockholders was not called was because no action had been taken by the Interstate Commerce [fol. 174] Commission. We expected to submit this plan. The annual meeting of the stockholders which was held on March 14, 1946 took the place of the meeting which the Director had in mind to call and it was at this meeting that the stockholders were again apprised of the fact that ultimately we might be forced to accept the approved plan of reorganization, that is, if it was approved by the district judge, so it subsequently was.

Answering paragraph 36 of the petition, this defendant says that it is true that no appeal from the order of the District Judge, approving the plan was taken by the Southwestern Railroad. In answer to this charge, I might say that any appeal by the Southwestern Railroad Company from the judgment of the District Court approving the Interstate Commerce Commission's plan for the Central of Georgia would have been entirely futile for the reason that the bankruptcy statute in the decision of the Supreme Court in complying and construing the statute gives the Commission practically unlimited power and authority to

exercise a person's judgment and when the exercise of this person's judgment has been approved by the District Court it is necessary on appeal to show either that the Commission acted arbitrarily or capriciously or that the Judge abused the discretion in approving the plan. There was no question of law involved in the judgment of the District Court with respect to the Southwestern Railroad because the position that the Southwestern Railroad had taken both before the Commission and the Court, that the Commission had no authority to require Southwestern to sell its property and that the extent of the Commission's jurisdiction went to the rejection and disaffirmance of Southwestern's lease was sustained both by the Commission and by the District Court; so we had nothing as a matter of law, that we could complain about.

Going to paragraph 37 of the petition, Southwestern says that its Board of Directors and officers assumed that the [fol. 175] plan or reorganization of the Central of Georgia would be submitted to its creditors for approval, before the three leased lines, including the Southwestern were called upon to either accept or reject the plan. We did not think that the Commission would require us to vote for the acceptance or rejection of the plan before it was determined whether the plan would be approved by the Central creditors and when the Commission sent out its order with this form of ballot; it appeared for the first time to the Southwestern Board that we would be required to vote on the plan contemporaneously with the creditors of the Central. Southwestern immediately applied to the Commission for an extension of the time in which it would be required to vote on this plan of sixty days, on the ground we already stated that we should not be required to vote on a plan when the plan might not be accepted by the Central's creditors and confirmed in the Court and second, the Board of Directors had no authority to accept the plan without the assent of a majority of Southwestern stockholders; that it would require some time to recall the stockholders for a meeting and acquaint the stockholders with the provision of the plan, certainly the new stockholders. This application was denied on the ground that the Commission thought there was ample time between the 11th of February and the 28th day of March in which to call a stockholders meeting and act on this plan.

That brings us to paragraph 38 of the petition. The meeting of the Board of Directors referred to in this petition was also held in Savannah. The purpose of the meeting was to determine what, if any action the Board should take at that time with reference to the acceptance or rejection of this plan. At the time that meeting was called the Commission had not sent out any ballot or promulgated any order with respect to voting on the plan. Director Tarbutton was at this meeting and stated that the New York brokers had advised him that within ten days or two weeks [fol. 176] there would be a market for a new security of the reorganization of the Central of Georgia Railway Company on a when issued basis. One of the difficulties confronting the Board was its inability to advise the stockholders with any degree of accuracy what the securities of the new Central to the purchase of Southwestern's properties would bring on the market; so it was decided at this meeting that we would wait for the market on the Central securities on a when issued basis. It turned out that Mr. Tarbutton's information was incorrect and there has been no market established on these securities up to this time.

Answering paragraph 39 of the petition, this defendant says that after the meeting of the Board of Directors held on the 25th day of January, 1947, on or about February 11, the Commission's orders came out requiring all creditors and the leased lines of the Central of Georgia Railway Company, including the Southwestern to vote for the acceptance or rejection of the plan or reorganization and so advise the Commission on or before March 28, 1947. The Commission's order contained a clause in which it stated that a failure to vote on this plan within the time prescribed would be considered a waiver to therefor either except or reject the plan. When this order came out the report of the president submitted by the directors, which is dated March 13, 1947, was prepared and sent out to the stockholders. I think Mr. Lyndon will state that his records show that this report went to the stockholders under date of February 22nd. This report informed the stockholders about this order of the Commission and pointed out specifically that provision of the order which said that a failure on the part of Southwestern to vote upon the plan within the period stated would operate as a waiver of the right to either accept or reject the plan. This letter of March 13, 1947 ad-

vised the stockholders that immediately after the stockholders meeting to be held on March 13th, the Board would [fol. 177] take definite action with respect to the Commission's offer and would at that time recommend to the stockholders either an acceptance or rejection of the provisions of the plan as would effect the Southwestern Railroad Company and would give its reasons therefor and the Board hoped to be able to advise the stockholders by March 13 what the securities allocated under the plan to the Purchase of Southwestern Railroad would be reasonably worth and that it was proposed to adjourn the annual meeting of stockholders to be held on the 14th to the 28th of March, 1947 and that in the meantime there would be a proxy sent to the stockholders so that they would have the right individually to vote on the question of acceptance or rejection of the plan.

They got that notice, most of them, I would say, around the 23rd or 24th of February. I think I should state, Your Honor, at this time in answer to this paragraph that the reason that the Board of Directors postponed its final determination of its recommendation to the stockholders until after the annual meeting of the stockholders, although the stockholders were put on notice that there was a movement on foot to unhorse the Southwestern management, that proxies were being solicited with a view of putting into power another Southwestern Board, members who would favor the acceptance of this plan so we considered calling a meeting of the Board of Directors immediately after we received notice of the Commission's order. Then it was decided it would be better to send out the form of letter I have just testified about and wait to see whether the Board would re-elect that Board. That was the reason for sending out this letter on February 22nd. In anticipation of that stockholders meeting, the Board had prepared for distribution among the stockholders this letter of the president, dated March 14, 1947. That was the act of giving to the stockholders the action taken by the Board immediately [fol. 178] following the meeting of the stockholders of the 13th. Some of them got this letter of the 14th, because I think they were mailed on the afternoon of the 13th, certainly got their letter by the 15th. So the Board did as stated in the letter to the stockholders, which went out after February 22nd, immediately acquainted the stockholders

with its recommendation and gave the stockholders its reason for acceptance of the plan, which is contained in this letter of March 14th.

Now accompanying that letter of March 14th was a proxy and in that proxy was this form of ballot. (Indicating.) This proxy contained a ballot so the stockholders could either vote for or against the plan in this form.

In response to paragraph 40 of the plaintiff's petition, this defendant says that at the annual meeting of the stockholders which was held on March 13, 1947, it is true that no action was taken by the stockholders with respect to the plan and no recommendation was made at that meeting by the directors with respect to this plan.

There was, however, considerable discussion of the plan among the stockholders present and it was stated by the chairman of the meeting that on the 28th day of March a full day, if necessary, would be devoted to a discussion of acceptance or rejection of this plan by the stockholders.

The allegations of paragraph 41 of the petition are admitted.

Answering paragraph 42 of the petition, this defendant says that for the reasons stated in the letter from its president sent out by order of the Board of Directors, the Board recommended to the stockholders the acceptance of the plan. I don't want to burden the answer with the contents of this letter but the stockholders were advised that the Board of Directors had thoroughly explored the possibility of selling [fol. 179] or leasing the Southwestern property to other parties on more advantageous prices than was offered in the Commission's plan but had been unable to secure any firm offer from any responsible interest. The Board advised the stockholders what the alternatives were to an acceptance of the plan that they were either to take the property back and undertake to operate it ourselves or apply to the Court for an order requiring the new company to operate the property for the account and at the risk of the Southwestern. The Board took the position that either one of these alternatives would be hazardous to the interests of the stockholders and while the Board still felt and so advised the stockholders that, in their opinion, the new Company would obtain the Southwestern for a price substantially less than its value, taking all factors into consideration we felt impelled to recommend that the plan be accepted.

With respect to the value of the securities allocated on the plan of the acquisition of Southwestern property, there has been, as I have already stated, no market established on these securities. The best the Board could do was to advise the stockholders what similar securities had sold for and on that basis the value for the Southwestern stock worked out $57.66 a share. To that was added the value of Southwestern cash and securities in its treasury of $17.82 a share. Those figures, as the Board advised the stockholders in this letter, were based on an assumption that the bonds of the new Company would be comparable with those of another railroad named in the letter, which the directors advised the stockholders could not and do not positively assert. So there was nothing misleading in the letter in what they might expect in the event they voted for acceptance of the plan. This paragraph charges that there were figures in the letter which would have led the stockholders to believe that the market price of the bonds would be approximately [fol. 180] $75.48, that is the figure I have just alluded to. That figure is arrived at by adding $17.82 per share to $57.66 per share, which gives $75.48 but as was stated in the letter, with respect to these figures, that they were based upon the assumption that the Central bonds would be comparable in market price to the St. Louis-San Francisco bonds "which we do not and cannot positively assert."

Answering paragraph 44 of the petition, the defendant admits the allegations of this paragraph.

For want of sufficient information this defendant, that is the Southwestern Railroad Company can neither admit nor deny the allegations of paragraph 45 but will require proof of these allegations.

Answering paragraph 46 of the petition, this paragraph complains of a lack of information given to stockholders by the Board of Directors and particularly because no information was given with respect to the amount of earnings of the Central of Georgia on the Southwestern properties since 1943 when the Central assumed the Southwestern lease. The Southwestern properties were operated by the Trustee of the Central for the period from June 19, 1940 to July 1, 1943 under the provision of what is known as segregation formula, which is an allocation of income and expenses among and between the mortgaged districts of the Central and the leased lines, which is, of course, an expen-

sive operation to apply. This formula was one the Central adopted on the Southwestern's lease on which it pays a fixed rental. On July 1, 1943, they abandoned therefore, according to advice given by the Central, any further application of the formula and Southwestern was unable to obtain from its lessee a statement of earnings on the part of Southwestern subsequent to July 1, 1943. For the reasons stated by the Central Controller, Mr. Fulton, that he was not able to formulate and could not furnish the information [fol. 181] requested and for that reason we were unable to give this information to the stockholders.

This next statement in paragraph 46 must have been inadvertently put in this paragraph. "No statement was made as to the vital importance of the Southwestern as to any re-organized corporation operating the present lines owned or leased by the Trustees of the Central," as a matter of fact, there was an entire paragraph devoted to that very question.

Mr. Bloch: I say it was not inadvertently put in the paragraph. I read very carefully what you are about to assume, the paragraph that starts off "Before both the Commission and the District Court, your counsel stressed South Western's position in the heart of the Central's system." Our point in alleging that was we didn't know whether Mr. Wright was of that opinion as he had previously expressed other things about which he had changed his mind.

Mr. Miller: There was brought to the attention of the Commission and the District Court, as well as Southwestern's counsel could present it, the fact that the Southwestern was in the heart of the Central's system, connecting Central's Georgia properties with its Alabama properties; that Southwestern was of great value to the Central system in handling the traffic interchanging with the Ocean Steamship Company in Savannah to points west of Birmingham. We called attention to the importance and value to the Central's system of the Southwestern on account of its very small capitalization, it being capitalized at $15,000.00 a mile. The Central's rent was base upon 5% of its capitalization. We expressed that it had been operated as a part of the Central system for seventy-five years and that it was conceded by the Central's Trustees that the Southwestern was indispen-

[fol. 182] sable to the successful operation of the Central's system as an integrated system."

Answering paragraph 47 of the petition, this defendant, for want of information, can neither admit nor deny the charge that the present management of the Central of Georgia has for the last week had out over Georgia representatives soliciting votes for the ratification of the plan. Southwestern vice president and counsel does have knowledge of the fact that Mr. Hunter Saussy came to Macon representing, as he stated, "Hunter Chism & Company" soliciting proxies from the Southwestern stockholders favoring acceptance for plan of reorganization. He also knows that this young man got no aid from any officer of the Southwestern Railroad in his campaign for the solicitation of proxies.

The allegations in paragraph 48 of the petition are admitted.

In response to paragraph 49 of the petition, the defendant says that from the time that the plan of reorganization of the Central was before the Commission, this defendant had made every effort to find some other reasonable lessee or a purchaser for this property, had contacted the executive officers of the Atlantic Coast Line Railroad, the Savannah railroad, the Seaboard and finally the Chesapeake and Ohio, as well as certain short line operators, who at one time manifested an interest in the acquisition of the South Western property. During this whole period the Southwestern's Board of Directors were opposed to an acceptance of this offer, which was subsequently approved by the Commission, and as stated to the stockholders as far back as March, 1946 the Board would only recommend its acceptance as the last resort when the failure to obtain any other offer dictated its acceptance. When this order of the Commission came out with this provision in it about the waiver if Southwestern failed to act on this plan, the Board real- [fol. 183] ized that in the event it failed to act or in the event it recommended to the stockholders a rejection of the offer that would put Southwestern in a position where it would have no offer from any source for the lease or purchase of this property. The Board considered it too hazardous for the stockholders for it to attempt to operate the road itself, had no rolling stock or other equipment, had no operating personnel and while it had ample operating capital, it was

thought from every source and mature consideration of all angles, that to embark upon independent operation at this time might prove disastrous to the stockholders. The other alternative was to have the property operated by a new company for the account of the Southwestern at the risk of the Southwestern. Of course, this entailed the possibility or even the probability of the Central operating at a large deficit, which under the Bankruptcy Act takes a . . . lien against the Southwestern property in favor of the new company. The history of some other leased line in reorganization, particularly as I recall it the Boston and Albany operated by the New Haven in reorganization had proved fatal to the interests of the stockholders in the leased lines. So taking all of this into consideration the Board reluctantly, as that attitude appeared from that letter, recommended the acceptance of this plan, as the only safe thing that we thought the stockholders could do.

Further answering this paragraph and with respect to the notice stockholders have had of this plan, this defendant says that in March of 1944 in its annual report to the stockholders it set out in great length the provisions of the plan with respect to the Southwestern Railroad. The plan had been filed by the Bankruptcy Trustee, with the Court and with the Commission in January of that year and this, of course, was the first opportunity that the Board had to acquaint the stockholders with the plan as it affected their interest.

[fol. 184] Again in 1945 in March the stockholders were informed of the proceedings which had been had with respect to the plan and what the Board had done representing the Southwestern Railroad before the Commission and what it proposed to do and then in 1946 the stockholders were advised of what the Commission had done and the matter was then pending before the District Court and they were put on notice in this letter to the stockholders that the Board might finally be compelled to accept the provisions of this plan, if it could do no better. I have already given what happened in the year 1947, so it is not a question of springing a brand new proposition on the stockholders and requiring them to act without adequate notice on what the issue was that they were to act upon.

The allegations of paragraph 51 of the petition are admitted.

The allegations of paragraph 52 are admitted.

The allegations of paragraph 53 of the petition and the subparagraphs of this paragraph are expressly denied, these allegations being substantially nothing more than a conclusion of law.

The allegations of paragraph 54 are denied on the same basis.

In answering paragraph 55 of the petition, this defendant says that it has always contended that its original charter and amendments thereto accepted by the company constitute a contract between the State of Georgia and the Southwestern Railroad Company and that this defendant has successfully sustained this position more than once in the Supreme Court of the United States. This defendant denies that the Act of 1933 of the General Assembly of Georgia *are* codified in Code Section 94-328 and 94-329 impairs the obligation of this contract with the State of Georgia:

[fol. 185] Answering paragraph 56 of the petition, this defendant says that the allegations of this paragraph are not true.

Answering paragraph 57 of the petition, this defendant says it is not true as alleged in this paragraph that on fourteen days notice to the stockholders, defendant's officers and directors changed their position with respect to the plan of reorganization of the Central of Georgia Railway Company. The defendant has heretofore set out in its answer the position of its officers and Board of Directors with respect to this plan.

The allegations in paragraph 58 of the petition are admitted.

Answering paragraph 59 of the petition, this defendant says that the plaintiff's stockholders will have a full opportunity at the stockholders meeting of this defendant to be held on the 28th day of March, 1947 to obtain the redress referred to in this paragraph.

The defendant denies the allegations of paragraph 60 of the petition and says that even if it should be true that the action in the stockholders of the defendant company in voting to accept the provision of the plan would be ultra vires and void beyond the charter power of the company such action would be a nullity and would not affect the redress sought by the plaintiffs in this case.

The allegations in paragraph 61 of the petition are expressly denied.

The allegations in paragraph 62 of the petition are denied.

The allegations in paragraph 63 of the petition are admitted.

The allegations of fact contained in paragraph 64 of the petition with respect to the effect to action of defendant stockholders are denied.

I think, Your Honor, that completes the answer of the defendant.

[fol. 186] Mr. Bloch: I would like to ask Mr. Miller some questions.

Mr. Miller: I would be glad to answer them if I can.

Mr. Bloch: Calling your attention to paragraph 9, Mr. Miller, which you answered specially, particularly with reference to our allegation that the Southwestern is a going corporation—isn't it true that under the lease of the Southwestern to the Central there is a provision that at the expiration of the lease that the Central must furnish equipment to the Southwestern's rolling stock?

Mr. Miller: I would not say that there was any provision of that sort in the lease.

Mr. Bloch: Can you give me what the provisions of the lease are?

Mr. Miller: I would have to give you the lease we have got.

Mr. Bloch: Did I understand you to say that there was no such provision?

Mr. Miller: No express provision in the lease furnishing equipment.

Mr. Bloch: What is the provision, as you call it, with reference to the Central furnishing rolling stock?

A. I don't want to misstate it.

[fol. 187] Mr. Bloch: Whatever the provision is, the Southwestern is contending there is an obligation on the part of the Central——?

Mr. Miller: Yes, sir, it certainly is and a suit is filed now in the District Court of the Savannah Division arising from that question, that suit is pending and has not yet been disposed of on account of this plan of reorganization.

Mr. Bloch: Do you recall when that suit was filed?

Mr. Miller: I would say a year or a year and a half ago.

Mr. Bloch: Would you mind getting a copy of that suit if you have an extra copy?

Mr. Miller: I will be glad to do so, I think perhaps that that suit was printed among the documents put out by the Bankruptcy Trustee.

Mr. Bloch: The lease under which the Trustee of the Central of Georgia is operating the Southwestern Railroad has not expired has it?

Mr. Miller: At the present time you mean?

Mr. Bloch: Yes.

[fol. 188] Mr. Miller: No, he is operating our property under the lease of 1895.

Mr. Bloch: That lease has not terminated?

Mr. Miller: It has not at this moment. I might add, in further response that we do not propose, Your Honor, to sell the Southwestern Railroad property until the lease is terminated. What the Southwestern directors *is* recommending to the stockholders is that they approve the action of the directors, accept this plan and sell the property after the lease has terminated as to railroad corporation.

Mr. Bloch: Q. What corporation?

Mr. Miller: My understanding is that this present Central of Georgia Railway Company—they may change their name as the Seaboard but my information is they are going to operate it under the same charter.

Mr. Bloch: As the Central of Georgia?

Mr. Miller: The Central of Georgia is incorporated under the Act of 1892.

Mr. Bloch: You are familiar, of course, with the report made by Mr. William Wyer on June 1, 1939?

[fol. 189] Mr. Miller: I am.

Mr. Bloch: All I want to ask does that exhibit show correctly the properties of the Southwestern Railroad Company, the criss-cross lines?

Mr. Miller: It does, even the two branch lines, one to Perry and one to Fort Gaines.

Mr. Bloch: Do you know what the mileage is from Columbus to Savannah via Macon and Southwestern?

Mr. Miller: Well, roughly speaking, the mileage from Columbus to Macon via Southwestern is 100 miles and from Savannah to Macon over the Central is one hundred and eighty-miles.

Mr. Bloch: One hundred and ninety one, isn't it?

Mr. Miller: One hundred and ninety-one miles, the highway is shorter than the railroad.

Mr. Bloch: Do you know what the mileage is from Columbus to Macon via Raymond and Griffin?

Mr. Miller: I do not, I reckon it could be calculated. It is considerably more than over the Southwestern rails at Fort Valley.

[fol. 190] Mr. Bloch: You stated in your response that the lines from Columbus to Raymond had heavy grades and had curves?

Mr. Miller: It has according to Mr. Wyer's report, it has. I am speaking from the record, I have no personal knowledge of it.

Mr. Bloch: That line from Columbus to Raymond is part of the Central route from Atlanta to Newnan, go from Atlanta to Newnan over the A&WP?

Mr. Miller: I think it is.

Mr. Bloch: Do you know the character of line from Raymond to Griffin?

Mr. Miller: I do not except what is set out in that report.

Mr. Bloch: That is part of the Chattanooga division?

Mr. Miller: Yes, sir.

Mr. Bloch: With respect to this Act of 1933, is it true, Mr. Miller, that the Southwestern has never expressly at any time accepted that Act as a part of its charter?

Mr. Miller: With the exception of the present time.

[fol. 191] Mr. Bloch: Speaking of it as the present situation?

Mr. Miller: With respect to the Act of 1933 it was passed, of course, for the leased lines of the Central of Georgia, that is what it was passed for.

Mr. Bloch: But the Southwestern has taken no official cognizance at all except these remarks about it in the president's letter?

Mr. Miller: Prior to the question for the acceptance or rejection of this plan we have not considered the Act of 1933 which was passed by the General Assembly for the benefit of the leased lines in Georgia as the authority for our stockholders to sell this property, if they see fit to sell it.

Mr. Bloch: With respect to the bonds which it is proposed by the Southwestern stockholders to accept in lieu of their stock, have you computed what return a stockholder who now has $1000.00 par value of stock of Southwestern and therefore receives a dividend of $50.00 a year, have you computed what return he would receive on these bonds, if they receive interest?

Mr. Miller: I have given it thought, I don't know that I have made an accurate mathematical calculation. It would depend entirely, of course, upon the payment of interest on these bonds.

[fol. 192] Mr. Bloch: Let's compute it right here? I mean the yield?

Mr. Miller: Yes, it could be very easily computed 4½% of the income bonds.

Mr. Bloch: Forty two dollars and forty cents at four percent?

Mr. Miller: It is figured in this letter somewhere.

Mr. Bloch: Forty-two dollars and forty cents at four per cent would be, I figure sixteen dollars and ninety six cents.

Mr. Miller: That is correct.

Mr. Bloch: And thirty-four dollars and ten cents at four and one half percent, I figure would be fifteen dollars and thirty four cents?

Mr. Miller: Fifteen thirty-five.

Mr. Bloch: Total of thirty two and thirty one cents.

Mr. Miller: That is correct, thirty-two and thirty-one cents.

Mr. Bloch: So that a stockholder owning ten shares of stock on which he now gets a dividend of fifty dollars a year——

[fol. 193] Mr. Miller: Would get thirty two and thirty one cents.

Mr. Bloch: The plan of reorganization was first promulgated in the early part of 1944?

Mr. Miller: January 28, 1944.

Mr. Bloch: And the next stockholders meeting of the Southwestern which was held after the promulgation of that report was the stockholders meeting of March 9, 1944?

Mr. Miller: That is correct.

Mr. Bloch: You called attention to the fact in your response that the President from the order of the Board of Directors submitted a report of that meeting dated March 9, 1944, which was probably sent out some weeks in advance calling attention to the plan?

Mr. Miller: That is right.

Mr. Bloch: When the stockholders met on March 9, 1946, formal resolution was presented by Mr. Anton P. Wright, fully discussed, participated in by many stockholders and upon motion of Dr. W. G. Lee, duly seconded, was unanimously adopted with the exception of one dissenting vote,

Mr. Bruce C. Jones. Do you recall how many shares stock he owned?

[fol. 194] Mr. Miller: I recall one hundred shares.

Mr. Bloch: At that meeting the books show there wa 27,286 shares represented in person and the resolutio provided: (reading resolution).

Mr. Miller: I drew the resolution and voted all th proxies to me in favor of it.

Mr. Bloch: At that same meeting Mr. Wright was re elected president of the Company and the Board of Direc tors, consisting of Mr. Wright, Jenkins, Lane, Tarbutton Johnson, Lyndon, yourself and Mr. Woodward were re elected?

Mr. Miller: That is correct.

Mr. Bloch: That is the Board as it now exists?

Mr. Miller: I think it is.

Mr. Bloch: The plan that the stockholders unhesitatingl rejected on March 9, 1944 is the same plan that is now pro posed?

Mr. Miller: So far as it applies to the Southwestern it is

[fol. 195] Mr. Bloch: I believe under the charter the stock holders elect a president and the director elects the othe officers?

Mr. Miller: Yes, sir.

Mr. Bloch: At the same meeting at which the preses president and the *president* Board of Directors were electe on March 9, 1944, the stockholders of the Southwestern l almost a unanimous vote rejected the same plan which the now are asked to pass on?

Mr. Miller: That is true. There were, I don't recall ho many stockholders were there in person.

Mr. Bloch: The minutes show there were 19,355 share represented by proxies in due form and 7,951 represente in person, making a total of 27,286 shares?

Mr. Miller: The proxies, as I recall it, I think were Mille Jenkins and Wright, and we voted as proxies for thos stockholders in favor of the resolution.

Mr. Bloch: Everybody voted for it except Mr. Bruc Jones?

Mr. Miller: That is right.

Mr. Bloch: Now, the next meeting of the stockholders wa held March 8, 1945?

[fol. 196] Mr. Miller: To second Thursday in March.

Mr. Bloch: According to the minute book it is March 8, 1945 and in your response you mentioned a letter that the president sent to the stockholders with respect to the plan in that meeting?

Mr. Miller: That was sent out some weeks ahead of the meeting.

Mr. Bloch: In that letter if you don't mind referring to it, on the last page, Mr. Wright, by order of the Board of Directors, told the stockholders "in the event the stockholders of the Southwestern should reject the terms of purchase as finally proposed by the Commission and approved by the Court, then the Plan provides that the lease shall be disaffirmed and the lessor shall take back its property. It would then become incumbent upon the Southwestern either itself to operate its property or to find another lessee or another purchaser. The Court has a right under the Bankruptcy Act to order the lessee (Central of Georgia Railway Co.) to continue the operation of the road for the account of the lessor until the abandonment of said line is authorized by the Commission." At that time the plan had not been approved by the District Court?

Mr. Miller: It had not.

Mr. Bloch: But Mr. Wright, as president, by order of the Directors, apprized the stockholders of what would happen [fol. 197] if the stockholders rejected the terms of the purchase as prepared by the Commission?

Mr. Miller: They advised them what could happen, what the alternative could be.

Mr. Bloch: Those alternatives are just as they are now?

Mr. Miller: Yes, sir.

Mr. Bloch: With that knowledge, I read you the following excerpt from the minutes, I read it for the records: the minutes of the stockholders meeting of March 9, 1944, page 183 of the book (reading): Mr. Bruce Jones spoke against the resolution, which was adopted with one dissenting vote, Mr. Jones being recorded as voting in that capacity. Is that correct?

Mr. Miller: That is absolutely true.

Mr. Bloch: At that meeting this same Board was elected and Mr. Wright was also elected president?

Mr. Miller: Yes, sir.

Mr. Bloch: At that meeting the minutes show that there were present, 23,784 shares of which 15,672 shares were represented by proxies and 8,112 shares were represented

[fol. 198] there personally. Then in 1946, Mr. Wright under date of March 14, 1946 sent out the letter to which you have alluded the last paragraph of which you called attention to and I think you called attention to another paragraph which I want to call to the Court's attention. You called attention to the last paragraph which is "Under the law our property cannot be sold or leased without the assent of the holders of a majority of our stock. Your Board has opposed the acceptance of the proposed terms of purchase until and unless, as a final resort, the lack of any other feasible plan of safeguarding the interests of the stockholders dictates the absolute necessity for its acceptance." In that same letter two paragraphs above Mr. Wright said to the stockholders: "Stockholders of this Company in meeting assembled, and upon two occasions have rejected the price offered for their property in the plan of reorganization. The offer for your property, in the opinion of your Directors, is entirely inadequate, unfair, and unjust to the stockholders of this Company. The conclusions reached in the plan are based on misleading and unreliable figures, and seem to totally ignore the fact that the property of this Company is necessary and indispensable to the successful operation of the Central system as a whole."

Mr. Miller: That is in his letter.

Mr. Bloch: With that letter before them, the stockholders re-elected Mr. Wright as president that year?

Mr. Miller: True.

Mr. Bloch: And again elected the same Board of Directors?

[fol. 199] Mr. Miller: They did.

Mr. Bloch: At the same meeting upon motion, which was duly seconded, the resolution adopted at the annual meeting of the stockholders held March 9, 1944, rejecting the Trustees offer of purchase of Southwestern property was unanimously reaffirmed?

Mr. Miller: That is true, I am sure.

Mr. Bloch: Mr. Bruce Jones must now have been there?

Mr. Miller: I don't think he was because he always requested that his holding the negative be recorded.

Mr. Bloch: At that meeting there was 24,342 shares represented of which 18,295 were represented by proxies and 6,047 were represented in person?

Mr. Miller: Yes, sir, the proxies I think were Wright, Jenkins and Miller and we voted them to the resolution.

Mr. Bloch: The last time the stockholders had opportunity to express their views on this question at the meeting of March 14, 1946 after unanimously rejected the same plan which the directors now propose they accept?

Mr. Miller: That is true.

[fol. 200] Mr. Bloch: In this letter also——

Mr. Miller: Circumstances, of course, are different now.

Mr. Bloch: How are the circumstances different now?

Mr. Miller: The difference in the situation is this, that on February 11, 1947, the Commission sent out this order requiring a vote on the plan not only by the creditors of the Central but also by the security holders of the leased lines. In that order they have the provision that failure to vote would operate as a waiver of the right to accept or reject the plan. That puts the Southwestern Railroad in the position that if we don't vote and reject or accept the plan we will have no authority from any source. That would drive the stock down.

Mr. Bloch: Do you think the Commission has any right to put in such thing into the plan?

Mr. Miller: That is my opinion on the question. I have restricted it and I am insisting that we should not be required to vote on this plan until the creditors have accepted it and the Court has affirmed it.

Mr. Bloch: You were general counsel for the Southwestern?

Mr. Miller: I have battled with the Central and the Central Trustee all that time with the Central Receiver in the [fol. 201] interests of the Southwestern for thirteen years. We started litigating in 1934.

Mr. Bloch: If the Commission has that right, they had it at the time of these meetings in 1944, and 1945 when you and the directors were recommending the rejection of the plan?

Mr. Miller: I assume they had it. I had not thought that we would vote on the plan at the same time the creditors would vote on it.

Mr. Bloch: Is there any other different circumstances from that that existed in 1946?

Mr. Miller: Yes, sir, because we were quite hopeful in 1946 that we were going to be able to defend this plan by selling our property to another interest on more advantageous terms than those offered in the plan before.

Mr. Bloch: I was trying to get the different circumstances,

so far you have narrated the Commission's act in making you vote on it and second the hope of a sale?

Mr. Miller: At least, here is what happened. We thought we had interested the C. & O. crowd through Mr. Young, who, I think, is their president and chairman of the Board of the Allegheny Corporation of Railroads, who had represented Southwestern's interest. Mr. William Weyer was a very close friend of Mr. Young's, he had been assistant with Vanswearinger Corporation, who was suc- [fol. 202] ceeded by Mr. Young's outfit and he and Mr. Young were very close personal friends and Mr. Wyer assured us that he thought Mr. Young would be interested in buying the Southwestern property on account of its strategic position in the Central system and would be willing to pay us considerab-y more more for it than allotted under the plan but that he was apprehensive under the doctrine laid down by the Supreme Court of the United States in two cases. It had recently heard that the Southwestern would not be able to deliver the property. Mr. Wyer attended one of our directors meetings held in Savannah where this negotiation was conducted and, of course, the directors looked to me as to what about that and I said, "there is nothing to that, those cases Mr. Wyer is talking about handed down by the U. S. Supreme Court simply held as I recall them that no Court, either State or Federal, should take action with respect to a line leased to another railroad in reorganization until the Commission first had an opportunity to say what would become of that leased property and the U. S. Supreme Court stayed the proceeding until that would be determined. The directors instructed me to bring a petition in the District Court.

My answer to that was that the Southwestern had been through and before the Commission, through the Court and both had held that we had a right, if we see fit, to recognize it and reject this plan, take our property back and operate it. Their New York counsel doesn't share that view. The directors instructed me to bring a petition in the District Court for the classification of that question, which I did. I filed a petition for declaratory judgment under the Federal statute, setting up all of the facts, setting up that the Commission had been through this plan thoroughly and had that our property should be acquired by the Central. In the event they didn't acquire it or they rejected the plan we could take the property back and that

[fol. 203] decision had been reaffirmed with the judge's order. The trustee came in and answered that petition that before we could take our property back and operate it we would have to obtain from the Commission a certificate of abandonment.

The question, of course, came up immediately whether we should appeal that judgment. We tried to get an offer out of Mr. Young's crowd that they would pay so much for the property subject to our ability to deliver it within the specified time. They were not interested in that and of course negotiations finally fell through.

So I say, Mr. Bloch, that that was the circumstances that changed the picture. We were very much encouraged, we thought we were going to be able to get $400,000.00.

Mr. Bloch: Judge Scarlett's decision in that declaratory judgment was purely a question of law, wasn't it?

A. I don't think so.

Q. You thought it was wrong?

Mr. Miller: Yes, I thought it was wrong.

Mr. Bloch: This letter of March 14, 1946 in which Mr. Wright by order of directors says the value of your property in the opinion of your directors is entirely inadequate, unfair and unjust to the stockholders of this company?

Mr. Miller: I shared that opinion.

Mr. Bloch: Do you still share it?

[fol. 204] Mr. Miller: Well, I think that it is entirely inadequate—this language.

Mr. Bloch: Unfair and unjust?

Mr. Miller: Very little between unfair and unjust—yes, I think it is. I always thought our stock was worth par if you want to know what I think about it.

Mr. Bloch: "The conclusions reached in the plan are based on misleading and unreliable figures"?

Mr. Miller: I contend they were for four or five years.

Mr. Bloch: You still think so?

Mr. Miller: Yes, and I did everything to make the Commission and the Court believe it.

Mr. Bloch: Q. You took a different view of it?

Mr. Miller: No, sir.

Mr. Bloch: "They seem to ignore the fact that the property of this Company is necessary and indispenable to the successful operation of the Central system as a whole."

[fol. 205] Mr. Miller: That was admitted but the Commission and the Court——

Mr. Bloch: How could they ignore it?

Mr. Miller: Mr. Wright in this letter simply stated that is what the Commission seemed to do. They didn't ignore it, they considered it and found against it.

Mr. Bloch: He says they ignored it?

Mr. Miller: That is his way of expressing himself.

Mr. Bloch: Something was said about a meeting in a private car—there was no implication made or intent—other meetings had been held in the car?

Mr. Miller: I would not have felt so much about it until this story came out that Mr. Callaway was there.

Mr. Bloch: I am not responsible for what the newspaper does or says.

Mr. Miller: I understand that the reporters are supposed to get their information from the counsel in the case.

[fol. 206] Mr. Bloch: They didn't get that from me. If I said anything about it I would say there were several meetings held in private cars.

Mr. Miller: Two as I remember.

Mr. Bloch: Two held in private cars and two at Oglethorpe Club and two at the C. & S. office?

Mr. Miller: Yes, sir, that is right.

Mr. Bloch: To get the chronological account to come up to this year, the order of the Commission was sent out February 11th?

Mr. Miller: That is right.

Mr. Bloch: The directors didn't meet until March 13th?

Mr. Miller: That is right.

Mr. Bloch: Why didn't the directors meet immediately upon receipt of the letter of February 11th?

Mr. Miller: I think that we had a meeting, as I recall it, on the 25th of January.

[fol. 207] Mr. Bloch: You knew nothing about the order at that time?

Mr. Miller: No, sir, nothing about the order and it was at that meeting as I recall it that Mr. Tarbutton seemed to think he had authenticity that they would have this market on securities in ten days or two weeks. It didn't materialize. As a matter of fact, as questioned by Mr. Varnedoe, who is in the brokerage business, some brokers had been very badly burned in selling stock on a when issued basis and the plan never came into existence. The directors had just had this meeting, as I recall it and Mr. Wright was very

much disturbed over the consideration of the question you are now asking me and he came up here to get the views of Mr. Lyndon and myself as to what should be done and I told him in view of the fact that we would have a meeting on the 13th day of March, I told him I think he should send out a letter to the stockholders putting them on notice what this order contained and tell them that we proposed to have a meeting on the 13th at which time it would be definitely determined by the Board what they would do and what would be advantageous to the stockholders, at which time we would be given an opportunity to vote on the plan and we did all that. You can see that from the letter to the stockholders which went out on February 22nd.

Mr. Lyndon: I have got some written on February 22nd at 4:30 p. m.

Mr. Miller: February 22nd was the date and the stockholders had plenty time of receiving that notice—until the 28th of this month.

[fol. 208] Mr. Bloch: Every action that the stockholders had taken was a rejection of the plan?

Mr. Miller: That is correct.

Mr. Bloch: The stockholders had no reason when they got that letter of March 14th to assume that the directors who had been elected was to accept the plan?

Mr. Miller: Well, the letter of March 14th speaks for itself.

Mr. Bloch: But the letter of March 14th was not sent out until after the stockholders meeting?

Mr. Miller: There were two letters both for the same date.

Mr. Bloch: The one dated March 13 is the annual report to the stockholders?

Mr. Miller: I beg your pardon.

Mr. Bloch: The letter of March 13 is an annual report of the Board of Directors from the President to the stockholders, which was sent out on February 22nd, prior to the meeting?

Mr. Miller: Yes, sir.

[fol. 209] Mr. Bloch: You always date your letters two or three weeks in advance?

Mr. Miller: Yes, sir.

Mr. Bloch: The letter dated March 14 was not sent out until after the officers and directors had been elected?

Mr. Miller: They were sent out on the afternoon of the 13th.

Mr. Bloch: The letter of March 13th, was there anything that would put the stockholders on notice that the director to be elected at the meeting were going to vote to accept this plan after it had been rejected for three years?

Mr. Miller: I don't think there is anything to put them on notice that it would be accepted. The stockholders knew what the plan was, the plan had been discussed and considered, I would say since March 1944.

Mr. Bloch: There is no question when the stockholders elected you on March 13th they didn't have any notice that you might change paces?

Mr. Miller: They didn't have any notice in that letter. There are a great many stockholders knew this thing might be inevitable.

[fol. 210] Mr. Bloch: Has any copy of the Callaway plan in its entirety ever been sent to the stockholders?

Mr. Miller: Not in its entirety, most of which is sixty-five pages of small print.

Mr. Bloch: At the meeting on March 13 Mr. Wright was again elected president?

Mr. Miller: Yes, sir.

Mr. Bloch: And the same Board was re-elected?

Mr. Miller: Yes, sir.

Mr. Bloch: And the Board met immediately and voted to recommend this plan?

Mr. Miller: Adopted this resolution.

Mr. Bloch: And then it was the letter dated March 14, was sent out?

Mr. Miller: It went out that afternoon.

[fol. 211] Mr. Bloch: You said something that I didn't get in your statement, you said something about a move to unhorse the directors, what was that?

Mr. Miller: That was a movement, I was advised of by Mr. Wright, that originated in Savannah. The movement looked to me like changes in the Southwestern management —it looked that way to me.

Mr. Bloch: Who was behind that?

Mr. Miller: I think—I was told who these men were. Varnadoe was one of them.

Mr. Lyndon: It was Varnadoe, Sanford, Murphy and Cunningham. I will say in behalf of Mr. Cunningham, Mr. Wright told me over the phone that Mr. Cunningham told

these gentlemen he would not stand for any change in the presidency and vice-presidency of the Company, they were his own close personal friends.

Mr. Bloch: Mr. Varnadoe——

Mr. Miller: Varnadoe in Savannah.

Mr. Bloch: That is the same company that is soliciting these proxies?

[fol. 212] Mr. Miller: Yes, sir.

Mr. Bloch: Mr. Chas. Sanford?

Mr. Miller: President of the Liberty Bank.

Mr. Bloch: And Mr. Murphy is chairman of the Board of the C&S?

Mr. Miller: Yes, sir, I think he is chairman of the Board.

Mr. Bloch: I mean no insinuation but is it true—the minutes don't show it, it is true that Mr. Wright and the Board were placed on nomination by Mr. Cunningham?

Mr. Miller: At the annual stockholders meetings this year, March 13, 1947, Mr. Cunningham, I am quite sure, nominated Mr. Wright and he may have named the Board.

Mr. Lyndon: He named both of them.

Mr. Andrew Lyndon testified as follows:

Mr. Bloch: It is alleged in this suit, paragraph 45, "some of the directors have expressed the view to one of your petitioners, that as Directors, they have recommended the [fol. 213] acceptance, but as stockholders they would oppose the sale." Is that a correct statement as to you?

Mr. Lyndon: I made that statement, yes, and I made that statement to people who called me up and asked me to advise them what to do. I told them I was not a director willing to assume their responsibility but as far as I was concerned I was willing to take a chance myself. I told them I would rather take less than fight this thing out, if it is possible. I nor any member of my family are large owners of stock or I might have a little different feeling. There is not over 150 shares of the stock involved.

Mr. Bloch: The last sentence of that paragraph, which completes the paragraph "These directors, however, have not made this view generally known to stockholders, who are laboring under the impression that the Directors have unqualifiedly recommended the plan."

Mr. Lyndon: I have unqualifiedly recommended to the stockholders that the plan be accepted as a director. I didn't vote against this recommendation as a director. I voted for this recommendation as a director. That was a unanimous "yes."

Mr. Wallace Miller testified as follows:

Mr. Bloch: I would like to read into the record the provisions of the 1895 lease between the Southwestern Railroad and the Central of Georgia Railway Company. I quote: "And the said lessee hereby further covenants and agrees to keep in as good order and repair as when it shall receive [fol. 214] possession and control of the same, the said lessor's railroads and other property and appurtenances; and in case it shall fail to pay any semi-annual amount of the rent as hereinbefore fixed on the first days of January or July in any years for the space of six months after the same shall become due and payable as hereinbefore provided, and be demanded by the lessor, it shall then be lawful for the Board of Directors of the said lessor to terminate this lease and enter and resume possession of said railroad with the appurtenances and all other of its property hereby demised, and from thenceforth this indenture and the estate, rights and privileges hereby granted, and every clause and article herein contained, shall cease, determine and be void. And the said lessee will thereupon deliver immediate and peaceable possession to the said lessor of said railroad and other property and appurtenances hereby demised in as good order as it received the same, replacing such as shall have been consumed by use or otherwise disposed of with other similar property of equal value." The contention of the Southwestern on that clause of the lease has been, as you stated this morning, that there was an obligation on the part of the Central to furnish it with rolling stock, locomotives, cars, etc.?

Mr. Miller: We took this position—that the lease of 1895 was an amendment and renewal of the original lease of 1869. The original lease provided, expressly, as I recall it, I had to see what lease provides for rolling stock—that word appeared in the original lease in the language of the release of 1869, with the exceptions of the word "rolling stock," and the lease of 1895 were almost identical, the only difference in the two leases being in the

lease of 1869 the lessee agreed to pay to the stockholders of the lessor a minimum return of seven per cent on the lessor's capital stock with the provision that [fol. 215] when the lessee paid this it would pay to the stockholders of the lessor a dividend in the ratio of 10.7. The trustees in raising this suit filed a very elaborate answer in which he set up various documents appearing in the pleadings and in the proceeding of the receivership of 1895 whereby he claimed that Southwestern's claim for rolling stock at that time was satisfied and extinguished and when the amendment and renewal case was entered into in 1895 we had no equipment in the way of rolling stock and the words in the lease of 1895 referred to depots and such personal property as you have around a depot. They can only be required to restore the value of the property as it existed in 1869, setting out what our rolling stock was in 1869—a small wood engine and cheap freight cars and the total value was $370,000.00. That would be the extent of the liability. I take the position what the lease meant was that we would be kept in an operating first class operating condition and as the industry improved or progressed we would have the same equipment corresponding to the equipment of the Central, equipment that the Central used on their own lines.

Mr. Bloch: The last report of the Southwestern prior to the lease to the Central in 1869 from Wyer's report shows that it had 32 locomotives, 13 first class passenger cars, 11 second glass, 5 baggage mail and baggage, one mail and express, 4 provisions, 11 cabooses, 215 box cars, 151 platform or flat cars, 8 stock cars.

Mr. Miller: The Central Railroad and Banking Company for a period of eleven years 1869 to 1881, kept a separate inventory on the equipment of the Southwestern. After 1881 or 1882 the lessee ceased to keep any record of [fol. 216] Southwestern's equipment and from then on it was mingled with the lessee's equipment and finally was all worn out or retired or became obsolete and junked.

Mr. Bloch: If the Southwestern rejects this plan, I believe you stated this morning, it would have one or two alternatives, one that the Central of Georgia reorganization company would operate for its account or the Southwestern could operate itself, is that right?

Mr. Miller: That is right.

Mr. Bloch: Do you think that the Central of Georgia's integrated system could operate without the Southwestern?

Mr. Miller: Why I would think there would be no difficulty whatever in their operation. Of course they would have the traffic arrangement with the Southwestern just like they would any other railroad with whom they have no connection. They would operate our track rights under the freight and passenger law.

Mr. Bloch: This letter of March 14 to the stockholders, Mr. Wright refers to the "fact that severance of Southwestern would mean a dismemberment of the Central system."

Mr. Miller: I think it would dismember the Central system. It would prevent the Central operating over its own rails between this Georgia and Alabama property. It would not bring about a cessation of shipments by the Central. [fol. 217] Mr. Bloch: It could make an arrangement with the Southwestern or the Coast line or other railroads?

Mr. Miller: Yes, sir.

Mr. Bloch: But it could not be the Central of Georgia system that it is now?

Mr. Miller: No, sir. What I am assuming if this railroad got in the hands of the Coast line or some strong competitor of the Central it would practically dismember the Central system.

Mr. Bloch: What does he mean by Southwestern's indispensability to the profitable operation of the Central as an integrated system?

Mr. Miller: He means by that—of course, that was the testimony of the Bankruptcy Trustee before the Commission. He elaborated on the traffic interchange of the Southwestern with the Ocean Steamship Company, which was an operating company, which I understand they propose to restore—they had to cease operations when the government ceded all their ships, he elaborated on that. He referred also to the very large and profitable interchange between the traffic of the Coast Line and the Central by means of Southwestern at Albany. There is a large movement of valuable freight handled at that Terminal. I assume he also referred to the passenger traffic and traffic to Florida the Central was operating at that time [fol. 218] five or six of these crack passenger trains which operate 106 miles over our rails and Albany and are turned over to the Coast Line at Albany, and the movement through the Birmingham gateway, which could not be handled economically except over Southwestern rails. The figures

show, I think, I recall with some degree of correctness, that although Southwestern rails constitute 18 percent of the Central's operating mileage, they constitute 26% of the Central primary main line which is the route from Macon to Fort Valley to Columbus.

Mr. Bloch: You sometimes speak of the Southwestern as a bridge line?

Mr. Miller: That has to do with a very great volume of traffic, the largest part of the Southwestern traffic, which is handled between north and south and east and west, handled between Macon and Albany and handled between Macon and Columbus. It is a traffic that Southwestern receives in connection with one end of this line and turned over at the connections at the other end of this line.

Mr. Bloch: It is a connecting link?

Mr. Miller: Overhead traffic.

Mr. Bloch: Do you agree with Mr. Lyndon that as director he was willing to recommend the acceptance but as a stockholder he would oppose the sale?

[fol. 219] Mr. Miller: His idea, in my opinion, is entirely consistent because Mr. Lyndon like Mr. Benton is entirely willing to gamble with his own money as a stockholder. As a director he had a very serious duty to the stockholders and as a director he said here this morning he thought that the best interests of the stockholders required him to recommend the acceptance of this plan. I felt the same way about it, although personally I would be willing to gamble my stock in the Southwestern in an independent operation.

Mr. Bloch: You have about the same view that Mr. Lyndon has?

Mr. Miller: Practically the same. I am not voting my personal stock against the plan, I am voting for it.

Mr. Bloch: If the Southwestern Railroad were operating as an independent railroad in order for the stockholders to do as well as they are now you would have to earn approximately $350,000.00.

Mr. Miller: Right now, the operation of the Southwestern under the lease, the Central pay in rent $259,595.00, on top of that, the Central pays the Southwestern's federal income tax, which is 40% of that amount, you can figure that. $260,000.00 at 40% is $104,000.00, which would be $364,000.00. They arrive at it that way. Take $260,000.00 add 40 per cent. Paying all of our taxes is such as paying so much in cash, figure 40% of 463 instead of 250—it runs

up around $411,000.00 and they pay $4,000.00 and they pay various other taxes like that, have to pay railroad retirement. Under the lease they agreed to pay all the taxes [fol. 220] and whatever the State taxes they pay all ad valorem taxes and they pay that one-half of one percent.

Mr. Bloch: Would it be fair to say $450,000.00 if they operated as an independent road, they would have to earn $450,000.00 to be in good position as they are now?

Mr. Miller: About that figure, yes, sir.

Mr. Bloch: That is for 333 miles of road; railroad?

Mr. Miller: I always thought it was 331.

Mr. Bloch: You have no way of knowing how much the Central earned on the Southwestern from 1943 up to now?

Mr. Miller: We have tried to get that information. He says he doesn't keep his records that way. Since the lease was adopted he cut out the old formula.

Mr. Bloch: When they operated under the formula from 1940 to 1943, do you know how much they earned?

Mr. Miller: I do not have those figures in front of me. I have got some of those back figures what they said. This is a page of trustee's plan of reorganization. For 1940 we had a very substantial deficit. For 1941 we had a small income.

[fol. 221] Mr. Bloch: Here it is, they are in your books?

Mr. Miller: In 1942 and 1943 we had tremendous earnings. I assume we had.

The Court: That is from the Central under the formula?

Mr. Miller: Yes, sir.

Mr. Bloch: I read you from your minutes, your minute book, page 117, it shows under the formula, 1941, the net earnings were shown on statement submitted $217,000.00?

Mr. Miller: 1941, that is correct.

Mr. Bloch: That was the Central using their own formula, to which the Southwestern never did consent?

Mr. Miller: Of course we never consented to it. We excepted to it in a great many ways. One or two of our exceptions were sustained.

Mr. Bloch: Page 134 of the minute book, which is shown under the formula the operations of the Southwestern for the year 1942 produced $921,860.70, do you recall that figure?

[fol. 222] Mr. Miller: No, sir, I do not.

Mr. Bloch: I am reading from the right place, am I not?

Mr. Miller: I am satisfied you are, I don't recall the figure you are reading. They show it here on the proposed plan of reorganization, that figure is $979,777.00.

Mr. Bloch: As against $921,860.00 here?

Mr. Miller: And the next figure we have is the six months figure in 1943.

Mr. Bloch: Do you recall what that was?

Mr. Miller: It is shown here as $985,869 for six months but I think the proper figure was approximately $1,500,000.00 for the first six months of 1943. I very distinctly remember signing a check of over one million dollars to the Federal Government. All of these figures were presented to the Commission just as strong as we knew how. We told the Commission in Washington in a hearing, based on these war records, that from July 1, 1943, the years 1944 and 1945—we had a hearing in 1945 that the Central would earn on the Southwestern more than they were offering us for our property and they said they paid no attention whatever to war earnings. They went back to these figures of the Trustees' plan of reorganization, which show deficit in the years 1936, 1937, 1938, 1939 and 1940. I think these figures showed an operating deficit of several [fol. 223] million dollars without taking into consideration the rent and the taxes they were paying us all the time. That would all add up to four or five million dollars.

Mr. Bloch: Doesn't the Central pay the State one-half per cent a year?

Mr. Miller: They pay the State one-half of one percent of the net income if the Southwestern Railroad derived from the operation of certain parts of the system not subject to ad valorem.

Mr. Bloch: Do you know what that tax amounted to in 1942, 1943, 1944, 1945 and 1946?

Mr. Miller: I don't know.

Mr. Bloch: Would you give us some estimate of what the Southwestern earned on part of this road?

Mr. Miller: I could give you a very accurate figure—60 percent. The Central Railroad split it that way instead of requiring them to keep separate accounts.

Mr. Bloch: Would you put in the hearing the amount of these figures?

[fol. 224] Mr. Miller: You want one-half of one percent paid to the State by the lessee for 1943, 1944, 1945, and 1946.

Mr. Bloch: When did you first learn of that move to unhorse the director and officers?

Mr. Miller: I don't remember that, prior to the stockholders meeting, ten days or two weeks prior to the stockholders meeting.

Mr. Bloch: Had this letter of March 14 that was sent by Mr. Wright to the stockholders been prepared at the time of the election of the officers and directors on March 13th?

Mr. Miller: To give it to you chronologically, I think I stated this morning that the letter dated March 13th was prepared in my office and prepared by me, that is the first one which gave notice of the stockholders of this order of the Commission and that the directors would meet. That must have been written around the 15th of February, somewhere around the 15th of February, just guessing at it—the directors would meet on the 13th day of March and reach a final decision in respect to what they would do about this plan. This next letter, dated March 14th either prepared and printed and ready for mailing to the stockholders immediately following the meeting of the directors on March 13th—that, I can't give you the exact date of the publication of that letter. I had quite a hand in it myself.

Mr. Bloch: At the time you gentlemen were elected directors and Mr. Wright was elected president at the stockholders meeting on March 13, you knew at the directors meeting you would recommend this plan to the stockholders?

[fol. 225] A. Yes, sir, and we told them they would be immediately notified and we had it prepared and ready for deposit in the mail. The stockholders were told that in the letter of February 22nd, that we would have that meeting and we were going to recommend the acceptance of the plan. We didn't know whether we would have the power to recommend it.

Mr. Bloch: You didn't know whether you would be elected or reelected?

Mr. Miller: Yes, sir.

Mr. Bloch:

Q. Did you tell them if the present management were re-elected you would recommend the plan?

Mr. Miller: No, sir.

Mr. Bloch: Although you knew it?

Mr. Miller: Yes, sir, I thought we would, unless somebody had $4,000,000.00 to buy the Railroad be contacted.

Mr. Bloch: The stockholders were not told at the election on March 13 that you gentlemen, if elected, would recommend the acceptance of this plan?

Mr. Miller: They were not expressly told, not in that communication from us.

[fol. 226] Mr. Bloch: Why did you not tell them?

Mr. Miller: I don't know if there is any special reason why we didn't tell them that. This plan was nothing new to the stockholders.

Mr. Bloch: The acceptance of it was something new to them?

Mr. Miller: They knew, of course, I imagine all the stockholders knew it. They had been advised by the Board that the Board was making every effort to get a better offer than the one set forth in this plan. They had been advised as a last resort that they might be compelled to recommend the acceptance of this plan and we finally told them in this letter we were going to take definite action at a certain time and would let them know about it immediately.

Mr. Bloch: On March 13 your Board of Directors at this regular meeting your Board took definite action with respect to the Commission's order and recommended to the stockholders either an acceptance or rejection of the provisions of the plan as they affect the Southwestern Railroad, giving its reasons therefor. At the time that letter was sent to the stockholders the Board of Directors knew if they were re-elected that they would recommend to the stockholders the acceptance of the plan?

Mr. Miller: I would say for one and I knew Mr. Wright and Mr. Lyndon for one anticipated that is what we would do, I can't speak for the others.

[fol. 227] Mr. Bloch: In this ballot, Mr. Miller, the troublesome language "failure to vote upon the plan as approved by this Commission and the Court within the period stated hereinafter, will, under the provisions of the Act, operate as a waiver of the right to accept or reject the plan"——

Mr. Miller: I take that to mean if we didn't vote on or before the 28th day of March, 1947 we would therefore have no right to either accept the plan or reject it and that the new company would be under no obligations to keep this plan open to us.

Mr. Bloch: (Quoting.) "Under the provision of the Act" that means, of course, the Bankruptcy Act.

Mr. Miller: Yes, sir.

Mr. Bloch: "Failure to vote upon the plan as approved by this Commission and the Court within the period stated hereinafter, will, operate as a waiver of the right to accept or reject the plan" in other words, failure to vote, under the provisions of the Act, would not a failure to vote under the Act be an equivalent of a rejection?

Mr. Miller: If I see their way they have got it a little stronger.

Mr. Bloch: They say "a waiver of the right . . ." They can't reorganize without us?

[fol. 228] Mr. Miller: No, sir.

Mr. Bloch: They cannot take the Southwestern Railroad away from us?

Mr. Miller: You are asking for a legal opinion there, there are two cases . . .

Mr. Bloch: You don't agree with their interpretation?

Mr. Miller: I don't but I am satisfied the Supreme Court would. What I think about it doesn't matter, what they think about it controls it.

Mr. Bloch: Paragraph 59 you do know that Mr. Benton sent out a letter on March 19 in which he requested a postponement of the meeting and another directors meeting?

Mr. Miller: Well, I know he addressed one to me and I have no reason to doubt he sent one to all the others. I am satisfied he did but I don't know myself.

L. O. Benton, Jr., testified as follows:

Mr. Bloch: Have you a copy of the letter of March 19, was that letter sent by my office at your instructions by registered mail?

[fol. 229] Mr. Benton: Yes, sir.

Mr. Bloch: Have you registered receipts from all of them?

Mr. Benton: I have received registered receipts signed by them or their agents.

Mr. Bloch: Each one of them?

Mr. Benton: Yes, sir.

Mr. Bloch: Are you a stockholder in the Southwestern Railroad?

Mr. Benton: Yes, sir.

Mr. Bloch: How many shares do you own?

Mr. Benton: 100 shares of stock in my own name.

Mr. Bloch: Were you a stockholder in 1932?

Mr. Benton: Yes, sir.

Mr. Bloch: Have you been a stockholder continuously since then?

[fol. 230] Mr. Benton: Yes, sir.

Mr. Miller: We want to offer these four annual reports to the stockholders signed by Mr. Wright, by direction of the Board of Directors, dated March 9, 1944, March 8, 1945, March 14, 1946 and March 13, 1947 and this additional letter to the stockholders signed by Mr. Wright as president at the direction of the Board of Directors, dated March 14, 1947. I would like to offer this order of the Commission. I would like to offer this proxy.

Mr. Bloch: Suppose I put this order of the Commission in for you and you can give me one back.

Mr. Wallace Miller: The Southwestern Railroad's income tax returns to the State of Georgia for the years 1943, 1944, 1945 and 1946 show the following net income:

1943—$719,396.94.
1944—None—no taxable income.
1945—$224,424.27.
1946—$248,386.67.

This income is entire income and not 60.34 of the income, which is subject only to an income tax of one-half of one percent.

[fol. 231] June Term, 1947, Bibb Superior Court

No. 11037

L. O. Benton, Jr. and Charles J. Haden

vs.

South Western Railroad Company, et al.

Joint and Several Answers to Petition

Come now South Western Railroad Company (a corporation), Anton P. Wright, Andrew J. Lyndon, and Wallace Miller, defendants named in the above-stated cause, and file

this their joint and several answers to plaintiff's petition therein, as follows:

1

These defendants admit the allegations contained in Paragraphs 2, 3, 4, 5, 6, 7, 10, 11, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 27, 28, 29, 33, 34, 39, 40, 41, 44, 48, 51, 52, 58, and 63 of plaintiffs' petition.

2

These defendants deny the allegations of Paragraphs 9, 46, 50, 53, sub-paragraphs (a) to (e), inclusive of Paragraph 53, Paragraphs 54, 56, 57, 60, 61, 62, and 64 of plaintiffs' petition, and tender an issue thereon.

3

For want of sufficient information, defendants, South Western Railroad Company, Anton P. Wright, and Wallace Miller, can neither admit nor deny the allegations contained in Paragraph 45; and defendant, Andrew J. Lyndon, says that he has made the statement that as a Director of South Western Railroad Company he favors acceptance of the [fol. 232] plan, but as a stockholder he intends to vote against the acceptance of the plan.

4

Further answering plaintiffs' petition, with reference to Paragraph 8 thereof, these defendants say that defendant, South Western Railroad Company, was incorporated by a special act of the General Assembly of Georgia in 1845, and its charter was subsequently amended by the General Assembly several times, which amendments were accepted by the defendant company, and that in its original charter as so amended there is no provision with respect to the sale of its railroad properties. These defendants deny, however, that the right to sell the entire physical properties of the company is governed by the general law as it existed at the time of the grant of its original charter and the amendments thereto; but say, on the contrary, that the right to sell its physical properties is expressly authorzied by the Act of the General Assembly of Georgia of 1933 (codified in the Code of 1933 as Section 328 of Title 94), upon the assent to said sale by a majority of its stockholders.

5

With reference to Paragraphs 12 and 13 of plaintiffs petition, these defendants deny that South Western Rail road Company's road and equipment property are worth $9,523,736.81 if by the word "worth" plaintiffs intend to charge that South Western Railroad's road and equipmen have a fair market value in this sum. Defendants say tha this figure was arrived at by writing up on its books its in vested capital, representing additions and betterments to its properties made by the lessees over a long period o years, of $4,247,661.27; and that this write-up of defendan [fol. 233] company's invested capital account upon its book was made for excess profits tax purposes, to increase it excess profits credit. Based upon this figure as so writte up, defendants concede that its stock has a book value o $180 per share, based on fixed assets alone. It is true tha the valuation placed upon South Western's railroads b the Interstate Commerce Commission as of December 3 1942, was $12,830,257. This figure represents the cost o reproduction, less depreciation.

6

With reference to Paragraph 14 of plaintiffs' petitio these defendants admit the allegations thereof, save an except the allegation that without the South Western th Central could not operate trains from the coal fields in th vicinity of Birmingham to Savannah and the coast, and tha without South Western the Central would have no line fro Macon to Montgomery, Alabama, the fact being that th Central could operate from Savannah to Columbus over i own lines, through Griffin and Raymond, without usin South Western's rails.

7

With reference to Paragraph 26 of plaintiffs' petitio these defendants deny that South Western's railroads a worth $9,500,000.

8

With reference to Paragraph 30 of plaintiffs' petitio these defendants admit the allegations contained in th paragraph, but say that the Interstate Commerce Co mission's plan was not approved by the District Court pri

to the annual meeting of stockholders held on March 14, [fol. 234] 1946. A report signed by the President of South Western Railroad Company was mailed to the stockholders some weeks prior to March 14, 1946, advising them of the status of the plan of reorganization of the Central; of the efforts being made by South Western's management to negotiate with other parties for the sale or lease of its properties on better terms than those offered in the plan of reorganization; and again stating to the stockholders that in the opinion of the Directors the offer contained in the plan was inadequate, unfair and unjust to the stockholders of their company. This report of the President concluded in these words: "Under the law, our property cannot be sold or leased without the assent of the holders of a majority of our stock. Your Board has opposed the acceptance of the proposed terms of the purchase until and unless, as a final resort, the lack of any other feasible plan of safeguarding the interests of the stockholders dictates the absolute necessity for its acceptance." The proxies held by the management were voted in the stockholders' meeting of March 14, 1946, in support of a resolution affirming the resolution of the stockholders adopted at the annual meeting in 1944, rejecting the offer contained in the plan.

9

With reference to Paragraph 31 of plaintiffs' petition, these defendants say that on or about the 22nd day of February, 1947, a report signed by Anton P. Wright, President, dated March 13, 1947, was mailed to the stockholders, in which they were advised that on February 11, 1947, the Interstate Commerce Commission passed an order in the Central reorganization requiring South Western Railroad to accept or reject the provisions of the plan, with respect to the acquisition by the new com- [fol. 235] pany of South Western's railroads, on or before the 28th day of March, 1947, and that under the order of the Commission a failure by South Western to vote upon the plan within the period stated would operate as a waiver of its right either to accept or reject the plan. In this letter the stockholders were further advised that the Board of Directors, at its regular meeting following the stockholders' meeting on March 13, 1947, would take definite action with respect to the Commission's order

and recommend to the stockholders either an acceptance or rejection of the provisions of the plan affecting South Western Railroad, giving its reasons therefor; that the stockholders would be promptly advised of the action taken by the Board of Directors on the Commission's order; and that it was proposed to hold an adjourned meeting of the stockholders on March 28, 1947, at which time every stockholder would be given the opportunity to vote, either in person or by proxy, upon the acceptance or rejection of the provisions of the plan. There was a general discussion of the provisions of the plan at the stockholders' meeting held on March 13, 1947, but no action was taken thereon by the stockholders. Immediately following the stockholders' meeting the new Board of Directors adopted a resolution authorizing acceptance by South Western Railroad of the plan of reorganization of the Central, subject to the assent thereto of a majority of its stockholders, and thereupon mailed to all stockholders of South Western Railroad Company a letter dated March 14, 1947, recommending to them acceptance of the plan of reorganization, and giving the reasons which impelled the Board to make such a recommendation.

10

With reference to Paragraph 32 of the petition, these defendants admit the correctness of the excerpt from the [fol. 236] minutes of the stockholders' meeting of March 14, 1946, but say that this paragraph fails to disclose all that was said to the stockholders at this meeting by South Western's President, by order of the Board of Directors.

11

In answer to Paragraph 35 of plaintiff's petition, it has already been stated in this response why no special meeting of stockholders was called following the directors' meeting of July 28, 1945.

12

In answer to Paragraph 36 of plaintiff's petition, these defendants say that it is true that no appeal was prosecuted to the order of the District Judge approving the Commission's plan of reorganization of the Central, for

the reason that in the opinion of South Western's counsel South Western had no valid grounds of appeal; that is, it could not be shown that the Interstate Commerce Commission had failed to exercise a business judgment or had acted arbitrarily or capriciously, or that the District Judge had abused his discretion in approving the plan or committed any error of law.

13

Answering Paragraph 37 of plaintiffs' petition, these defendants say that the Directors of South Western Railroad Company did not believe that the Commission would require the leased lines of the Central who were not creditors to vote on the plan of reorganization until after the plan had been accepted by the creditors, confirmed by the Court, and put into effect; and that when the Commission notified South Western that it must vote, under [fol. 237] penalty of being deprived of its right either to accept or reject the plan, contemporaneously with the vote of the creditors, South Western applied to the Commission for an extension of sixty days within which it might vote to accept or reject the plan. This application for an extension was denied by the Commission.

14

Answering Paragraph 38 of plaintiffs' petition, these defendants say that there was no action taken at the meeting of the Board of Directors held on January 25, 1947, with respect to what recommendation the Board would make to the stockholders with reference to the acceptance or rejection of the plan of reorganization, because at this hearing one of the Directors stated that he had been assured by certain brokers dealing in securities that within two weeks there would be established a market for new Central securities on a when-issued basis. The Board of Directors was most desirous of being able to inform the stockholders what they would be able to secure for the First Mortgage Bonds and the Income Bonds of the new company, in the event they determined to accept the provisions of the plan.

15

Answering Paragraph 42 of the petition, these defendants say that the stockholders knew, because they had been

kept informed by the Directors, of the Directors' efforts before the Commission and the District Court to have South Western's existing lease with the bankruptcy trustee adopted by the new company under instruction from the stockholders; and the stockholders knew, because they had been kept informed by the Directors, of the efforts of South Western's management to obtain from other interests a better offer than that contained in the plan; and [fol. 238] the stockholders knew, because they had been so advised by the Directors as far back as March, 1946, that they might ultimately be forced, as a last resort, to accept the provisions of the plan, or else take their properties back and undertake to operate them, or petition the Court to have these properties operated by the new company at the risk and for the account of South Western. So it is that there was nothing sudden in the action of the Directors taken on March 13, 1947, in recommending an acceptance of the plan to the stockholders.

16

Answering Paragraph 43 of plaintiffs' petition, these defendants say that the letter referred to in this paragraph speake for itself. They further say that the alleged book value of $180 per share, already explained heretofore in this answer, is in no sense indicative of the market value of South Western stock.

17

Answering Paragraph 47 of the petition, these defendants say that they are without knowledge of the charge that the present management of the Central has recently sent out over the State representatives actively soliciting votes for an acceptance of the plan. They do say that a representative of Varnedoe, Chisolm & Company, of Savannah, Georgia, came to Macon and solicited proxies from stockholders in the City of Macon, favoring acceptance of the plan. This representative, however, received no assistance in his solicitation from these defendants.

[fol. 239] 18

Answering Paragraph 49 of plaintiffs' petition, these defendants say that the South Western Board of Directors

has refused to postpone the adjourned meeting of the stockholders to be held on March 28, 1947, by reason of the order of the Interstate Commerce Commission requiring South Western to vote on the acceptance or rejection of the plan on or before March 28, 1947.

19

Answering Paragraph 55 of plaintiffs' petition, these defendants say that the charter of South Western Railroad and the amendments thereto, granted by the General Assembly of the State of Georgia, is an inviolable contract between South Western Railroad Company and the State of Georgia which cannot be impaired by subsequent adverse legislation. These defendants deny, however, that its charter and the amendments thereto constitute such a contract between South Western Railroad Company and its stockholders as to require the unanimous vote of the stockholders to effect a sale of South Western's properties.

20

Answering Paragraph 59 of plaintiffs' petition, these defendants admit that plaintiffs have requested a meeting of defendants' Board of Directors for the purpose of presenting their views on the question of acceptance or rejection of the Commission's plan of reorganization of the Central, and plaintiffs will doubtless appeal to the stockholders at the adjourned meeting thereof to vote for a rejection of said plan.

[fol. 240] 21

Further answering plaintiffs' petition, these defendants say that South Western Railroad was originally chartered by an act of the General Assembly of Georgia approved December 27, 1845, and that Section 14 of its original charter provides: "That the said railway and its appurtenances and all property therewith connected shall not be subject to be taxed higher than one-half of one percent upon its annual net income.

This charter was subsequently amended by the General Assembly of Georgia by acts approved December 27, 1847; December 30, 1847; February 11, 1850; February 14, 1850;

February 23, 1850; by act approved January 22, 1852, authorizing South Western to lease its railroad to the Central Railroad & Banking Company of Georgia for and during the entire continuance of the corporate existence of the South Western under its then existing charter or under any amendments or extensions thereof that might be thereafter made; by act approved March 4, 1956, authorizing the consolidation of the Muscogee Railroad under the charter of the latter company; by act approved December 19, 1859, authorizing an increase in the capital stock of the South Western Railroad Company for the purpose of acquiring the Georgia & Florida Railroad Company; by act of December 10, 1860, authorizing an increase in the capital stock of the South Western Railroad in the sum of $500,000; by act of December 18, 1860, authorizing the construction of a branch railroad; and by act of December 11, 1862, authorizing the election of seven directors instead of five.

These defendants show that South Western Railroad was duly consolidated and merged with the Muscogee Railroad, and thereafter on June 1, 1869, said consolidated properties and such additions thereto that had been con-
[fol. 241] structed by South Western Railroad Company were leased to the Central Railroad & Banking Company and its successors in title for a period of 101 years, renewable on the same terms forever; and the construction of all branch railroads authorized by amendments to South Western's charter were completed during the 19th Century and have been under continuous lease to the Central Railroad & Banking Company of Georgia and its successors in title for the past seventy-eight years.

Approximately 60 percent of South Western's mileage enjoys the tax limitation provision in its original charter, while 40 per cent of South Western's mileage is subject to ad valorem taxation in the same manner and to the same extent as property owned by other citizens of this State. The lines which enjoy the tax limitation are known as the Charter Lines and the other lines are known as the Non-charter lines.

22

So it is, from a practical standpoint, that the only provision of South Western's charter which constitutes an inviolable contract with the State of Georgia is the pro-

vision limiting all taxation of South Western's Charter Lines to one-half of one percent of the net income from the operation of said Charter Lines.

23

When the Central of Georgia Railway Company, successor in title to the Central Railroad & Banking Company of Georgia, went into receivership in December, 1932, it was then operating under lease three different railroads, the Augusta & Savannah Railroad, running from Millen, Georgia, to Augusta, Georgia; the Chattahoochee & Gulf, [fol. 242] which connects with the South Western Railroad at Columbia, Alabama, and extends therefrom through southeastern Alabama; and the South Western Railroad.

The General Assembly of Georgia, knowing that under the general railroad laws of this State as they existed at the time of the receivership of the Central of Georgia Railway Company, in December, 1932, the leased lines of the Central could not lease or sell their properties by reason of the fact that the general railroad law, as codified in Sect. 303 and Sect. 318, Title 94 of the Code of Georgia of 1933, did not apply to them, passed an act in 1933, codified as Sect. 328, Title 94, Code of Georgia of 1933, authorizing any railroad corporation organized under the laws of Georgia, which had theretofore leased its properties for a long term of years to another corporation, which lease had terminated and the lessor was not a going concern or equipped to conduct the operation of a railroad company, to sell or lease its property, rights, and franchises to another railroad company upon such terms as may be agreed upon by the board of directors of the selling or lessor corporation and assented to by the holders of a majority of its stock.

24

These defendants show that the Act of 1933 was not forced upon the South Western Railroad against the will of South Western Railroad or its stockholders, and in no sense impaired the obligation of the contract between South Western Railroad and the State of Georgia. On the contrary, this Act was adopted by the General Assembly of Georgia for the benefit of all leased lines in this State coming within the provisions of the Act.

[fol. 243] And having fully answered plaintiffs' petition, these defendants pray that they be hence discharged.

(Sgd.) Miller & Miller, Attorney for South Western Railroad Co., Anton P. Wright, Andrew J. Lyndon, and Wallace Miller.

Answer of Defendants, South Western Railroad Company, Anton P. Wright, Andrew J. Lyndon and Wallace Miller.

Filed in Office, 19 day of April, 1947.

ACKNOWLEDGMENT OF SERVICE

IN THE SUPERIOR COURT OF BIBB COUNTY, GEORGIA

No. 11037

L. O. BENTON, JR., et al.

vs.

SOUTH WESTERN RAIL ROAD COMPANY, et al.

Due and legal service of the within and foregoing petition acknowledged. Copy received. Process and copy process waived. All further and better service waived.

This 26 day of March, 1947.

(Sgd.) B. J. Tarbutton.

[fol. 244] BIBB SUPERIOR COURT, JUNE TERM, 1947

No. 11037

L. O. BENTON, JR. and CHARLES J. HADEN

vs.

SOUTH WESTERN RAILROAD COMPANY, et al.

DEMURRER TO PETITION

Come now South Western Railroad Company (a corporation), Anton P. Wright, Andrew J. Lyndon, and Wallace

Miller, defendants named in the above stated cause, and file this their demurrer to plaintiffs' petition therein on the following grounds; to-wit:

1

Generally, because no cause of action is set forth against these defendants or any of them.

2

Because there is no equity in the petition.

3

Because no facts are alleged to justify the relief sought.

Wherefore, these defendants pray that the grounds of their demurrer be inquired into by the Court and said petition be dismissed.

(Sgd.) Miller & Miller, Counsel for South Western Railroad Company, Anton P. Wright, Andrew J. Lyndon, and Wallace Miller; Gladys Abel, Dep. Clerk.

Filed in Office 19 day of April, 1947.

[fol. 245] IN THE SUPERIOR COURT OF BIBB COUNTY, GEORGIA

11037

L. O. BENTON, JR., and CHARLES J. HADEN

vs.

SOUTH WESTERN RAIL ROAD COMPANY

REQUEST TO STRIKE PARTY PLAINTIFF

To the Superior Court of Bibb County, Georgia, and the Judges Thereof:

Comes now Charles J. Haden, and respectfully requests the Court to strike him as a party plaintiff in the case stated. This May 13, 1947.

(Sgd.) Charles J. Haden.

We consent to the above request.

(Sgd.) Hall & Bloch, Attorneys for Plaintiffs. (Sgd.) Wallace Miller, Attorney for Defendants.

ORDER STRIKING PARTY PLAINTIFF

The foregoing motion considered.

It is ordered that Charles J. Haden be stricken as a party plaintiff in the case stated.

This May 16th, 1947.

(Sgd.) Mallory C. Atkinson, Judge, Superior Courts, Macon Circuit.

Request of Charles J. Haden to be stricken as a party plaintiff in the case.

Filed in Office 16 day of May, 1947.

[fol. 246] BIBB SUPERIOR COURT

#11037

L. O. BENTON, JR. and CHAS. J. HADEN

vs.

THE SOUTHWESTERN RAILROAD COMPANY, et al.

JUDGMENT.

The within matter coming on to be heard before this Court on March 26th and March 27th, 1947 on response to rule nisi dated March 25th, 1947, on the question of issuance or denial of interlocutory injunctive relief; after hearing evidence and the argument of counsel on such dates the Court having announced that an order would be passed on March 29th; thereafter on March 29th Court having deferred passing any such order for an additional one week upon request and agreement of counsel; and thereafter upon informal request acquiesced in by counsel for both the parties hereto the passage of any such order was further deferred; thereafter, to-wit on April 18th, 1947, an injunctive process issued from the District Court of the United States for the Southern District of Georgia restraining and enjoining the petitioners herein from further prosecuting the action in this Court. Now therefore it is considered ordered and adjudged by this Court:

First. Under the facts recited herein, the time of deferring the entry of order having expired, and some of the parties hereto being under restraint and injunction prohibit-

ing any acts on their part prosecuting this action, the Court deems it proper to proceed without any other or further prosecution to pass such order as to this Court seems meet and proper under the circumstances outlined, under the facts and circumstances developed upon the hearing referred to, and after consideration of the authorities cited.

[fol. 247] Second. Petitioners seek the injunctive process of this Court on two grounds, viz:.

(1) That the contemplated (if not enjoined) action on the part of the defendants would be beyond the charter powers of the defendant railroad company, and

(2) That such injunctive relief is warranted on account of alleged mismanagement of the corporate affairs by the defendant's officers and directors. With reference to the second ground this Court holds that there is no evidence of mismanagement on the part of the defendant's officers and directors and the relief sought is on that ground not warranted.

Third. The original charter of the defendant railroad company of itself and without modification or amendment would not permit the action to prevent which injunctive relief is sought. "It is now a well settled principle that a corporation, being a creature of the law, has only the powers conferred upon it by its charter, and all others not necessarily implied therefrom are withheld. Its grants, whether of powers or exemptions, are always to be strictly construed, and its obligations are to be strictly performed, whether they may be due to the state or to individuals. It seems also to be well settled that a railroad corporation, and it is with such that we are dealing in this case, cannot, without special authority of statute, alienate its franchise or property acquired under the right of eminent domain, or essential to the performance of its duty to the public, whether by sale, mortgage or lease." 101 U. S. 71; 17 How. 30; 21 How. 441; 4 Biss 35; 10 Allen 448." Singleton vs. South Western Railroad Co., 70 Ga. 464, 467.

It is argued that the right of contracting for sale or lease as contemplated was granted by the State Legislative Act [fol. 248] of 1933, Ga. Code #94-328, which purports to authorize such action by such a corporation upon assent of the holders of a majority of its stock.

The original charter constituted a contract between the State of Georgia, the incorporators (or stockholders)—

which would include all of the stockholders, and the public, and any act of the legislature of Georgia which would impair the obligations of that contract would not be effective for that purpose.

Alexander vs. Atlanta & West Point Railroad Company, 108 Ga. 151, 156, 157.

The Trustees of Dartmouth College vs. Woodward, 4 Wheat 518; 4 U. S. (Ld. ed.) 629.

We are not unmindful of the interest of the public in such a contract and we recognize that the Courts have been properly diligent in the protection of such rights, placing considerable emphasis upon the public good. There has been placed within the jurisdiction of the Interstate Commerce Commission wide jurisdiction, and that commission quite properly gives paramount consideration to the public welfare.

Smith vs. Hoboken R. R. etc. Co., 90 L. ed. 880.

Thompson vs. Texas Mexican Rwy. Co., 90 L. ed. 886.

Be that as it may, and without basing this decision on the question of whether or not the contemplated action may or may not be to the public interest, we do not consider that the Courts, even in that interest, are prepared to repudiate the principles of law hereinbefore mentioned.

[fol. 249] Fourth. It is therefore ordered that the defendants, the officers and directors of the defendant railroad company, be and each and all of said defendants are hereby restrained and enjoined from carrying into effect any provision for the sale or lease of the railroad properties of the defendant railroad company pursuant to any acceptance or purported acceptance of any plan for any such sale or lease not authorized by a unanimous vote of the stockholders of the defendant company; and specifically that such officers and directors be and they are hereby restrained and enjoined from filing with the District Court of the United States for the Southern District of Georgia, or with the Interstate Commerce Commission any acceptance of such a plan; and specifically that such officers and directors be and they are hereby restrained and enjoined from selling to such re-organized company as may succeed the Central of Georgia Railway Company and its Receiver, or to anyone else, or to any other company, all of the defendant railroad company's railroad properties, rights and franchises; and

specifically that such officers and directors be and they are hereby restrained and enjoined from executing any written instrument which might convey the fee simple title to the property just mentioned unto the reorganized company or any other person or company; and specifically that such officers and directors be and they are hereby restrained and enjoined from doing and performing any act in behalf of the defendant railroad company which might tend to consummate the plan of re-organization of the Central of Georgia Railway Company with respect to the acquisition by that company of the properties of the South Western Railroad Company.

So ordered this April 24, 1947.

(Sgd.) Mallory C. Atkinson, Judge, Superior Courts, Macon Circuit.

Filed in office 4-24-47.

[fol. 250] BIBB SUPERIOR COURT, JUNE TERM, 1947

No. 11037

L. O. BENTON, JR. and CHARLES J. HADEN

vs.

SOUTH WESTERN RAILROAD COMPANY, et al.

BILL OF EXCEPTIONS PENDENTE LITE

Be It Remembered that on the 25th day of March, 1947, plaintiffs in the above-entitled cause filed their petition against the South Western Railroad Company and the members of its Board of Directors named in said petition, praying:

(1) That the defendant officers be restrained and enjoined from holding the stockholders' meeting of South Western Railroad Company on March 28, 1947, and from submitting to such meeting the acceptance or rejection by South Western's stockholders of the plan of reorganization of the Central of Georgia Railway Company with respect to the acquisition of South Western's railroads.

(2) If the Court should refuse to restrain the holding of the stockholders' meeting, and the stockholders by a majority vote should vote in favor of acceptance of the plan, then

that the officers of South Western Railroad Company be restrained and enjoined from carrying such acceptance of the stockholders into effect, and, specifically, from filing with the Interstate Commerce Commission or with the reorganization Court any acceptance of the plan, and, specifically, from selling to the reorganized company, or to anyone else, or from performing any act in behalf of South Western in furtherance of the plan of reorganization of the Central.

[fol. 251] A hearing was had before his Honor Mallory C. Atkinson, one of the Judges of the Superior Courts of the Macon Judicial Circuit, on March 26, and 27, 1947, in response to the rule nisi dated March 25, 1947, requiring the defendants to show cause why they should not be enjoined as prayed in plaintiffs' petition.

At said hearing evidence material to the exceptions hereinafter noted was adduced as follows:

Plaintiffs are the holders of stock of the South Western Railroad Company. L. O. Benton, Jr. has been such since 1932. South Western Railroad Company is a railroad corporation chartered by special act of the General Assembly of Georgia approved December 27, 1845. Its charter was thereafter amended by special acts of the General Assembly of Georgia a number of times, which amendments were accepted by the South Western Railroad. There is no provision in the original charter of the South Western Railroad Company or in any amendment thereto with respect to a sale of South Western's railroad properties. South Western's railroads have been under lease continuously since June 1, 1869; first, to the Central Railroad and Banking Company of Georgia, and subsequently, in the form of an amended and renewed lease, to the Central of Georgia Railway Company, and then, successively, to its receiver and bankruptcy trustee. South Western Railroad is a non-operating railroad and is not a going concern doing business within the meaning of the Federal capital stock tax law. Its status as a non-operating railroad not carrying on business was judicially determined in litigation in the Federal Courts between South Western Railroad and the Internal Revenue Department of the United States.

South Western is not equipped to operate its railroads, having no operating personnel and no rolling stock and [fol. 252] equipment. South Western has a claim against the Central of Georgia Railway Company, under its lease,

for rolling stock and equipment, which is the subject matter of a suit now pending in the District Court of the United States for the Southern District of Georgia.

The plan of reorganization of the Central of Georgia Railway Company, with respect to the South Western Railroad is as follows:

"Prior to or upon consummation of the plan, the debtor shall also acquire, if they can be acquired on the terms hereinafter set forth, properties at present leased to the debtor by the South Western Railroad. . . . If any of these properties shall not be acquired as a result of the acceptance of the plan by the leased line security holders, then and in that event the lease or leases of any line or lines not so acquired shall be disaffirmed as of such time at or prior to the consummation of the plan as the Court may direct. The method of acquisition, whether through purchase, merger, or consolidation, shall, subject to the approval of the Commission and the Court, be determined by the Trustee or by the reorganization managers when they begin to function. If the leased lines are acquired, the railroads to each of the three and the personal property appurtenant thereto and all the real estate owned by each lessor, shall be conveyed to the reorganization company; each of said lessors shall waive any damages to which it has become or shall become entitled on account of any breach of lease; and the South Western Railroad Company shall waive all claims in respect to equipment. Such conveyances and waivers shall in each instance be the sole consideration of the delivery to each of the respective lessors of the securities proposed to be allocated to it as hereinafter specified."

[fol. 253] The "debtor" referred to herein is the Central of Georgia Railway Company.

The securities proposed to be allocated to the holders of South Western Railroad Company capital stock referred to in the above-quoted portion of the plan were provided for in the plan as follows: "Holders of South Western Railroad capital stock would receive for each $1,000.00 of stock, $423.80 in new first mortgage Series A bonds, and $340.97 in new income mortgage Series B bonds" of the proposed reorganized company.

On January 28, 1947, the Interstate Commerce Commission ordered the submission of the plan of reorganization, approved by the Commission and by the United States District Court, to the creditors, as set forth in the Com-

mission's order, including the South Western Railroad Company as one of the leased lines of the debtor. This order provided that in order that a ballot may be valid it must be filed with the Commission on or before March 28, 1947, or the envelope containing the ballot must be postmarked showing it was placed in the mails on or before that date. The Commission's order further provided that the failure to vote upon the plan as approved by the Commission and the reorganization Court by March 28, 1947, would operate as a waiver of the right to accept or reject the plan.

The South Western's Board of Directors, by letter to the stockholders dated March 14, 1947, recommended to the stockholders the acceptance of the Commission's plan of reorganization, giving its reasons therefor. Enclosed in this letter was a proxy running to the South Western management, which contained a ballot for or against acceptance of the Commission's plan of reorganization, to be voted by the stockholders at an adjourned meeting of the [fol. 254] regular annual meeting of the stockholders of South Western Railroad Company to be held on March 28, 1947. The stockholders were advised by South Western's Board of Directors in this letter of March 14, 1947, that under the provisions of the Georgia law (Section 328 and Title 94 of the Code of Georgia of 1933) authorizing the sale of certain leased railroads, South Western's railroad properties could not be sold without the assent of the holders of a majority of South Western's stock.

That the Act of the General Assembly of Georgia of 1933, codified as Sect. 94-328 of the Code of 1933, was enacted by the General Assembly of Georgia for the benefit of the leased lines of the Central, as the general railroad law of 1892 did not apply to these leased lines.

After hearing evidence and argument of counsel, the Court anounced that an order would be passed on March 29, 1947. Thereafter, on March 29th, the Court having deferred passing any such order for an additional one week upon request and agreement of counsel, the passage of any such order was further deferred.

Thereafter, to-wit, on April 18, 1947, an injunctive process issued from the District Court of the United States for the Southern District of Georgia restraining and enjoining plaintiffs herein from further prosecuting their action in this Court.

Thereafter, on April 24, 1947, the Court granted an interlocutory injunction, restraining and enjoining the officers and directors of the defendant company from carrying into effect any provision for the sale or lease of the railroad properties of the South Western Railroad Company pursuant to any acceptance or purported acceptance of any plan for any such sale or lease not authorized by a unani-
[fol. 255] mous vote of the stockholders of the defendant company; and specifically restraining and enjoining such officers from filing with the District Court of the United States for the Southern District of Georgia or with the Interstate Commerce Commission any acceptance of such plan; and specifically restraining and enjoining such officers and directors from selling to such reorganized company as may succeed the Central of Georgia Railway Company or to any other company all of the defendant railroad company's railroad properties, rights and franchises; and specifically enjoining and restraining the defendant officers and directors from executing any written instrument which might convey the fee simple title to the properties of the South Western Railroad Company to the reorganized company or to any other person or company; and specifically restraining the defendant officers and directors from doing and performing any act in behalf of the defendant railroad company which might tend to consummate the plan of reorganization of the Central of Georgia Railway Company with respect to the acquisition by that company of the properties of the South Western Railroad Company.

Whereupon, defendants, South Western Railroad Company, Anton P. Wright, Wallace Miller, and Andrew J. Lyndon, then and there excepted and now and here except to said injunctive order of the Court dated April 24, 1947, and assign the same as error, and say that said order requiring the unanimous consent of the stockholders of South Western Railroad Company to effect a valid sale of its railroad properties, and enjoining South Western's officers and directors from carrying into effect a sale of its properties in pursuance of Section 94-328 of the Code of Georgia, is invalid and contrary to law.

[fol. 256] Said named defendants then and there excepted and now and here except to said injunctive order of this Court dated April 24, 1947, and assign the same as error, and say that this Court is without jurisdiction to enter said injunctive order restraining and enjoining South Western's

officers and directors from filing with the District Court of the United States for the Southern District of Georgia or with the Interstate Commerce Commission any acceptance of the plan of reorganization of the Central of Georgia Railway Company, approved by the Commission and the United States District Court having jurisdiction of the reorganization proceedings of the Central, and restraining and enjoining South Western's officers and directors from selling to such reorganized company as may succeed the Central of Georgia Railway Company all of defendant railroad company's property.

Defendants contend that under the bankruptcy law of the United States the Interstate Commerce Commission and the District Court of the United States for the Southern District of Georgia, having and exercising jurisdiction of the reorganization proceedings of the Central of Georgia Railway Company, have paramount and exclusive jurisdiction of the approved plan of reorganization of the Central of Georgia Railway Company; that South Western Railroad Company is a party to said reorganization proceedings in said United States District Court; and that the acquisition of South Western's railroads is a material part of the approved plan of reorganization of the Central; and that the injunctive order of this Court will defeat and prevent the reorganization plan of the debtor as it relates to the South Western Railroad Company. Wherefore, defendants contend that said injunctive order is invalid and contrary to law for want of jurisdiction in this Court.

[fol. 257] And defendants further contend that the Act of the General Assembly of Georgia of 1933, codified as Section 94-328 of the Code, did not impair the obligation of the contract between South Western Railroad Company and the State of Georgia, and was a valid exercise of the legislative authority of the General Assembly of Georgia, sanctioning and authorizing the sale of leased railroads coming within the provisions of said Act; and defendants contend that the Court should have denied the injunctive relief prayed for in plaintiffs' petition.

Defendants tender their bill of exceptions pendente lite and pray that this bill of exceptions be certified as true and placed on the record.

This 30th day of April, 1947.

(Sgd.) Wallace Miller, Defendants' Counsel.

CERTIFICATE OF THE JUDGE

The foregoing bill of exceptions pendente lite is true. Let the same, with this certificate, be placed upon the record.

This 3rd day of May, 1947.

(Sgd.) Mallory C. Atkinson, J. S. C. M. C.

[fol. 258] ACKNOWLEDGMENT OF SERVICE

Due and legal service of the foregoing bill of exceptions pendente lite is acknowledged; copy thereof received, and all further service waived.

This — day of April, 1947.

——, Counsel for Plaintiffs.

I certify that I have served counsel for plaintiffs in the above-stated case with this bill of exceptions pendente lite by handing a copy thereof to Mr. Ellsworth Hall, of the firm of Hall & Bloch, attorneys at law, Macon, Georgia.

This 30th day of April, 1947.

(Sgd.) Wallace Miller.

Bill of Exceptions, Pendente Lite of Defendants, South Western Railroad Company, Anton P. Wright, Wallace Miller, and Andrew J. Lyndon. Filed in office 3 day of May, 1947.

Filed August 27, 1947.

[fol. 259] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 260] IN UNITED STATES CIRCUIT COURT OF APPEALS, FIFTH CIRCUIT

No. 12130

L. Q. BENTON, JR., et al.,

versus

MERREL P. CALLAWAY, As Trustee of the Property of Central of Georgia Railway Company, Debtor, et al.

ARGUMENT AND SUBMISSION—December 2, 1947

On this day this cause was called, and, after argument by Charles J. Bloch, Esq., for appellants, and T. M. Cunningham, Esq., for appellees, was submitted to the Court.

[fol. 261] IN THE UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 12130

L. O. BENTON, JR., et al., Appellants,

vs.

MERREL P. CALLAWAY, as Trustee of the Property of Central of Georgia Railway Company, Debtor, et al., Appellees.

Appeal from the District Court of the United States for the Southern District of Georgia

Before Hutcheson, Holmes, and Lee, Circuit Judges

OPINION—Filed January 13, 1948

HOLMES, Circuit Judge:

This appeal is from a judgment of the court below, entered in the exercise of its bankruptcy jurisdiction, which permanently enjoined the appellants (individually and as members of a stockholders protective committee) from prosecuting a suit filed in the Superior Court of Bibb [fol. 262] County, Georgia. A temporary injunction had been issued by said state court against the officers and directors of the South Western Railroad Company, restraining them, without the unanimous consent of the stockholders, from the execution of any written instrument conveying to the debtor or its trustee the fee-simple title of the property of said railroad company. This injunction was annulled, and further proceedings in the state court enjoined, by the bankruptcy court. The issue presented here is whether the court below had jurisdiction to stay proceedings in the state court and to annul the action previously taken therein. More definitely, the question is: did the bankruptcy court, in a reorganization proceeding under Section 77, have exclusive jurisdiction to determine whether the properties of South-Western legally could be acquired by the Central of Georgia, on the terms set forth in the plan, by a mere majority vote of the stockholders of South-Western? The answer to this question turns upon whether

or not the bankruptcy court had jurisdiction *in rem* of property the conveyance of which had been enjoined by the state court. The facts are undisputed, and are substantially as follows:

The Central of Georgia Railway Company is the debtor in a reorganization proceeding under Section 77 of the Bankruptcy Act, as amended. The proceeding was filed by the debtor in the court below in 1940, and is now pending therein. Prior to 1940 (beginning in 1932), the debtor's properties were operated by a receiver appointed in an equity suit in the federal court. For many years prior to the suit in equity, the South Western Railroad Company was operated by the debtor under a lease dated June 24, 1869. A plan of reorganization of the debtor was promul- [fol. 263] gated by the Interstate Commerce Commission. It proposed to issue $14,000,000 of 4% first-mortgage bonds, due in 1995, and $16,000,000 of 4½% income bonds, due in 2022. It proposed the allotment to South-Western of $2,200,000 of first-mortgage bonds and $1,700,000 of income bonds if it would convey all of its leased property to the debtor. The allotment thus offered to South-Western was that proposed by the trustee of the debtor in the reorganization plan submitted by him.

Objections to the proposal by South-Western were unavailing in the district court. The bonds are to be issued by the reorganized company, but whether that will be the debtor or a new corporation is to be determined later by the reorganization managers. Upon confirmation of the plan, the reorganized company is required to have title to all the property of the debtor, but this requirement is not to be construed as prohibiting the rejection of any lease. The plan provides that, prior to its consummation, the debtor shall acquire the properties of three railroads leased to the company, including South-Western, if they can be acquired upon the terms specified in the plan. This provision may be disregarded as to one of the leased roads if the reorganized company shall not acquire the property of the South-Western Company. If any of these properties shall not be acquired as a result of the acceptance of the plan by the leased-line security holders, then the lease of any line not so acquired shall be disaffirmed. The method of acquisition, whether through purchase, merger, or consolidation, is to be determined by the trustee, or the reor-

ganization managers when they begin to function. The [fol. 264] importance to the debtor of acquiring South-Western is indicated by the fact that, if it fails to do so, the provision for the acquisition of the Chattahoochie & Gulf Railroad Company may be disregarded.

The South Western Railroad Company was incorporated under the laws of Georgia in 1845. Its capital stock is of the par value of $5,191,100, all of which is common stock. Its properties are free from mortgage or other liens. It owes no bonded indebtedness. Its current liabilities are less than $100,000. Its road and equipment were valued at $12,830,257 by the Interstate Commerce Commission in 1942, and at $9,523,736.81 by its board of directors in 1947. Its properties comprise some 340 miles of railroads, bridges, depots and appurtenances, in the southern portion of the Central of Georgia's railway system. Without the South-Western, the Central could not operate its trains from Florida through Macon to the north and west; without it, the Central could not operate its trains from the coal fields in the vicinity of Birmingham to Savannah. Emanating from Macon, the lines of South-Western form part of Central's system through Fort Valley to Columbus, Georgia; and through Fort Valley to Americus, Smithville, Albany, Georgia, and Eufaula, Alabama. In addition to its railroad properties, South-Western has in its hands government and municipal securities of the market value, as of December 31, 1946, of $1,124,581.25. The plan does not contemplate the transfer of these securities to the reorganized company.

We think the bankruptcy court erred in attempting to exercise exclusive jurisdiction over property which the [fol. 265] debtor did not own and upon which it had no lien. The debtor was in actual possession of the tangible property leased by it, but it held the same as lessee, not as owner in fee. The granting of a lease always supposes that the grantor reserves to himself a reversion in the leased premises. A leasehold estate is personal property which becomes subject to the exclusive jurisdiction of the bankruptcy court upon the filing of a petition by the debtor under said Section 77; but the lessor's title in fee, out of which the leasehold was carved, was not an asset of the debtor, and no claim of title thereto or lien thereon is made by the debtor or its trustee.

The jurisdiction of the federal district courts sitting in bankruptcy is limited to matters conferred by statute expressly or impliedly. Such jurisdiction is paramount and exclusive in the administration of the bankrupt's estate. The basis of the court's exclusive jurisdiction *in rem* is its actual or constructive possession of the debtor's property.[1] It is not limited to the administration of property that belonged to the debtor without question, but extends to the determination of all questions of title or liens affecting the debtor's estate. It is not exclusive as to the right or title of a party not in bankruptcy to property not legally or equitably owned or claimed by the debtor. Section 77(a) provides that during the pendency of the reorganization proceedings the court shall have "exclusive jurisdiction of the debtor and his property wherever located." By 77(c)(2) the title and powers of the trustee are assimilated [fol. 266] to those of trustees in ordinary bankruptcy proceedings. *Meyer v. Fleming, supra.*

In the instant case, the plan assumes that the fee of the leased lines will be acquired by the acceptance of the plan, and provides that, if not accepted, the lease of any such line shall be disaffirmed. Not only that, but the Act itself looks forward to the contingency of a lease being rejected and of the lessor being unable to operate the line. In this event, the Act provides that it shall be the duty of the lessee to continue operation of the line for account of the lessor until the abandonment of such line be authorized by the Commission.[2] There is no danger of the public interest being adversely affected by rejection of the lease and the inability of the lessor to operate the railroad.

The suit in the state court, which was enjoined by the judgment below, was a proceeding *in personam*, between parties not in reorganization, over property that might never be acquired by the reorganized company. The Commission recognized this fact, and expressly provided that nothing in the plan should be construed as a grant

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[1] Schumacher v. Beeler, 293 U. S. 367; Continental Bank v. Rock Island Ry., 294 U. S. 648; Meyer v. Fleming, 327 U. S. 161; In re Retail Stores Delivery Corporation, 5 Fed. Supp. 892; In re Straus & Co., Inc., 6 Fed. Supp. 547; 11 U. S. C., Sections 11 and 46.

[2] 11 U. S. C. A. 205(c) 6.

of authority for the transfer of the debtor's property until further action of the Commission. The plan contemplated that the leased lines should be acquired upon the terms stated in the plan. The question submitted to the state court for decision was whether or not the fee of South-Western's properties, exclusive of the lease, could be legally conveyed by the owner by a vote of a simple majority of its stockholders. This was peculiarly a question of state law. It was not a controversy over property in the actual or constructive possession of the trustee.

[fol. 267] Whatever control the court below had over South-Western's assets was not by reason of the fact that its railroad properties were in the custody of the court, but simply because the leasehold estate was the property of the debtor. It was specifically pointed out by the Interstate Commerce Commission that no petitions for reorganization of the lessors had been filed. Undoubtedly the Commission intended that the reorganized company should get a good marketable title to the property in question.

If the leased lines shall be acquired, the plan provides that the railroads of each of the three, and all the real estate owned by each lessor, must be conveyed to the reorganized company; each of said lessors must waive any damage to which it has become or shall become entitled; and the South Western Railroad Company shall waive all claims in respect to equipment. Such conveyances and waivers will be the sole consideration of the delivery to each of the respective lessors of the securities proposed to be allocated to it as thereafter specified in the plan. There is much that needs to be done in carrying out the Commission's plan of reorganization, and the sooner an authoritative decision in the state court is obtained in the above suit, the nearer the parties may be to the consummation of that plan.

The modernization of American bankruptcy law by the enactment of Section 77 of the Act, and kindred legislation, did not alter, lessen, or abolish the several distinct classes of jurisdiction exercised by the bankruptcy court. Such jurisdiction in civil cases is either *in rem* or *in personam*, exclusive or concurrent, summary or plenary. The power [fol. 268] to adjudicate as to bankruptcy, to grant or refuse discharges, to administer assets of the bankrupt, and to close estates, is exclusive. The exclusive jurisdiction of the district court in reorganization proceedings is that

which bankruptcy courts have customarily possessed.[3] In entering the judgment in this case, annulling and staying proceedings in the state court, the bankruptcy court undertook in a summary proceeding to exercise exclusive jurisdiction *in rem* as to property that the trustee did not own but was seeking to acquire. The proceeding in the state court that was enjoined, and the injunction that was annulled, were strictly *in personam*. It does not appear from this record that the bankruptcy court had any jurisdiction whatever of that controversy; but, conceding that it did, such jurisdiction was concurrent, not exclusive, and should not have been exercised in a summary proceeding.[4]

The Commission envisaged a merger or consolidation as well as a purchase of the leased lines, but the activities of the trustee so far as this record shows have been directed principally to the acquisition of South Western's properties by purchase. The lessor has been made an offer for its property upon specific terms, which it must accept or reject. If it rejects the offer, its lease will be disaffirmed. There is nothing in the plan to indicate that an *ultra vires* acceptance is authorized or required, or that any state law which prohibits acceptance should be disregarded. The plan does [fol. 269] not provide that the leased lines may be acquired by a simple majority vote of the stockholders of the company.

Because the debtor's trustee has actual possession under its lease of certain tangible property of the South Western Railroad Company, the trustee claims to be in possession of all the property in controversy. We do not concur in this contention. The debtor is seeking (not to enforce a lien upon tangible property as in *Warren v. Palmer*, 310 U. S. 132, but) to acquire the incorporeal reversionary interest of its lessor, which arose by operation of law when the leasehold was carved out of the fee-simple title. This is a vested future interest to commence in possession after the determination of the lease. The lessee is not disputing the lessor's title, but is seeking to acquire it, and

[3] Meyer v. Fleming, 327 U. S. 161, 66 Sup. Ct. 382, cited in Gardner v. New Jersey, 329 U. S. 565.

[4] Kline v. Burke Construction Co., 260 U. S. 226, 43 Sup. Ct. 79; Central New England R. Co. v. B. & A. Co., 279 U. S. 415; Mandeville v. Canterbury, 318 U. S. 47, 49, 63 Sup. Ct. 472, 473.

is claiming that the bankruptcy court is administering this intangible asset. The fallacy in the argument is this: In the case of a tangible *res*, there can be possession in fact as well as in contemplation of law; but in the case of something intangible, possession is purely a legal concept that manifests itself only through recognition of legal consequences.[5] So far as pertinent here, the legal consequences of a debtor's possession of a tangible asset at the time of his bankruptcy are that his trustee in bankruptcy succeeds to the debtor's possession; and that the bankruptcy court, acquiring possession thereby, has summary jurisdiction *in rem* to adjudicate adverse claims respecting the asset. Therefore, for practical reasons, the law attaches to the ownership of intangible property the legal consequences of possession of a tangible *res*. Thus in this case the law limits the possession of the lessee to the dura-[fol. 270] tion of the lease, while it attaches to ownership of the reversion in fee the legal consequences of possession. Such reversion, not being owned by Central at the time its petition for reorganization was filed, is in legal contemplation not now in possession of the bankruptcy court; and, since the law attributes to its mere ownership the legal consequences of possession, the bankruptcy court has no jurisdiction *in rem* of said reversionary interest.

It is well settled that the bankruptcy court has no summary or exclusive jurisdiction *in rem* of tangible property adversely held by a third party under a bona fide claim of ownership.[6] The same is true of intangible property, except that ownership of the latter carries with it the legal consequences of possession. In the case of a reversion, the law attributes to ownership the jurisdictional consequences of possession. To illustrate, let us suppose that South-Western were the debtor here, and that Central were a solvent corporation holding under its lease. The bankruptcy court would have jurisdiction *in rem* of the reversion, but not of the leasehold.

From another angle, let us suppose that both Central and South-Western were insolvent, and that each was the debtor in a reorganization proceeding pending in

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[5] In re Worrall, 79 F. (2) 88; In re Marsters, 101 F. (2) 365.

[6] Harrison, Trustee, v. Chamberlain, 271 U. S. 191.

different judicial districts. Can anyone doubt that one court would have jurisdiction *in rem* of the leasehold and another of the reversion? Then the symmetry of the Bankruptcy Act, as amended, would come into view. The federal judicial power would be exercised by the courts to the extent vested in them, and the delegated power of the [fol. 271] Congress to regulate commerce would be exercised by the Interstate Commerce Commission. A harmonious plan of reorganization of both roads would be promulgated by the Commission, subject to the approval of one court as to Central and another court as to South-Western, with final jurisdiction in the Supreme Court.

A solvent corporation, which has appeared specially as creditor and lessor in a reorganization proceeding, cannot be constitutionally compelled against its will to convey to the debtor a larger and better title than was granted in the lease. The Commission knew this, and made provision for disaffirmance of the lease. Its use of the word "acquired" implied that something was to be added to the debtor's estate. The plan did not contemplate that the limited interest of the debtor in the leased lines should be converted into a fee-simple title without the consent of the owners. Such an economic blood transfusion is not strained; it is a matter of contract with the carrier that is not in reorganization.

The appellants here do not ask that the plan of the Commission be set aside or that the order of the court below approving it be reversed. They ask that full effect be given to the language of the plan. Counsel for the trustee stated at the stockholders' meeting: "The plan makes an offer to you gentlemen; that is all it does." The plan did not attempt to amend the charter of South Western Railroad Company.[7] In its opinion approving the plan, the court below said: "If the lessors do not ac[fol. 272]cept the proposal to acquire their lines, they are, on disaffirmance, at liberty to take their properties back." In a letter to the stockholders, the president of the company quoted that part of the court's opinion, and said: "So it

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[7] Compare In re New York, New Haven & Hartford R. Co., 147 F. (2) 40. The Central of Georgia here corresponds to New Haven in that case; South Western corresponds to the Terminal Company.

is that under the terms of the approved plan, South Western is not required to accept the Trustee's offer of purchase, but may take its property back and operate it, or petition the Court to require the new company to operate South Western's railroads at the risk and for the account of South Western as provided by the Bankruptcy Act."

The judicial process is brigaded with the administrative process in reorganization proceedings under Section 77.[8] The bankruptcy courts and the Interstate Commerce Commission work cooperatively, but this does not mean that the statutory powers of the two departments are blended so that either may exercise the functions of the other. Each exercises its own distinct powers. The court may judicially approve or affirm legislative or executive action by the Commission, but it is only the latter that has full power under Section 5(11) to approve a sale, merger, or consolidation of two railroads with the assent of a majority of the stockholders unless a different vote is required under applicable state law.[9] It is only upon action by the Commission, subject to confirmation by the court, that the reorganized company may carry such transaction into effect without invoking any approval under [fol. 273] state authority and without regard to state or federal prohibitions.[10]

In thus transcending all existing legislation, it is the Commission, not the court, in reorganization proceedings that is exercising the delegated legislative power of Congress under the Constitution to regulate commerce. This accounts for the concluding sentence of the paragraph to the effect that no federal corporation is deemed created thereby, but that any power therein granted to any carrier shall be in addition to and in modification of its powers under its corporate charter or under the laws of any state.[11] This provision does not authorize the Commission to compel a railroad corporation, which is not a

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[8] Palmer v. Massachusetts, 308 U. S. 79, 87, quoted in Smith v. Hoboken R. R. Co., 328 U. S. 123, 132; Warren v. Palmer, 310 U. S. 132, 137, 138.

[9] 49 U. S. C. A. 5(11).

[10] 11 U. S. C. A. 205(b) authorizes the plan to include "the amendment of the charter of the debtor."

[11] 49 U. S. C. A. 5(11).

debtor in reorganization proceedings, to enter into a sale, lease, merger, or consolidation, but authorizes the carrier, with the required assent of its stockholders, to participate in any such transaction with the approval of the Commission. Neither does it authorize the bankruptcy court to compel a lessor not in reorganization to sell its property to the debtor, or to a reorganized company. It has no application to the controversy now being litigated in the state court between the stockholders of South-Western. The suit in the state court was intended to prevent the illegal conveyance of South-Western's interest that was not subject to the lease. Such contingency was within the contemplation of the Commission when the plan was promulgated.

Every plan of reorganization of a railroad, within the meaning of Section 77, is required to provide adequate [fol. 274] means for its execution, which may include "the amendment of the charter of the debtor"; but there is no authorization for the court to amend the charter of a creditor or lessor that is not a debtor in reorganization.[12] Upon confirmation of the plan, which is subject to judicial review, the debtor, or any other corporation organized for the purpose of carrying out the plan, shall have full power to put it into effect; and shall do so: the laws of any state to the contrary notwithstanding.[13] Evidently there must be a real or substantial conflict between the plan and any state law before the latter may be disregarded. The execution of the plan is "subject to the supervision and control of the judge," Sec. 205(f), *supra;* and this ought to be assurance enough that state authority will be overridden only to the extent necessary to make the plan effective. We have been cited to no provision in the plan that conflicts with any law of Georgia.

For the bankruptcy court to hold that a majority vote of the stockholders of South-Western would be sufficient, regardless of state law, would amount to amending the plan in the face of the statute which provides that no plan shall be approved or confirmed by the judge "unless the plan shall first have been approved by the Commission and certified to the court."[14] The just-cited statute

[12] 11 U. S. C. A. 205(b)(5).

[13] 11 U. S. C. A. 205(f).

[14] See last sentence in 11 U. S. C. A. 205(d).

expressly provides that the Commission may modify any plan which it has approved; and in *Chicago, R. I. & P. Ry. Co. v. Fleming*, it was held that the court must approve or disapprove the plan in its entirety; that it alone cannot correct the plan, but may suggest improvements to the Commission.[15]

[fol. 275] We think the judgment appealed from should be reversed, the injunction dissolved, and the cause remanded for further proceedings not inconsistent with this opinion. It is so ordered.

Reversed.

DISSENTING OPINION

HUTCHESON, Circuit Judge, Dissenting:

What is in question for decision here is not, as would appear from the opinion of the majority, a mere question whether in an ordinary bankruptcy proceeding the Court of Bankruptcy could enjoin proceedings in an in personam suit brought in the State Court. It is whether in a railroad reorganization proceeding the Reorganization Court, having issued an injunction against the further prosecution by minority stockholders of a suit to enjoin a leased railroad, whose participation is vital to the reorganization plan, from approving the plan, is powerless to prevent a State District Judge from staying the whole reorganization proceedings by enjoining, in accordance with the prayer of the minority stockholders' petition, the carrying out by the leased railroad of an approved reorganization plan which its officers, its directors, and the majority of its stockholders have accepted and which the Reorganization Court finds has been validly accepted.

In determining this ultimate question, three primary questions must be answered.

The first one is: After the minority stockholders have been enjoined by the Reorganization Court from prbceed-[fol. 276] ing with their injunction suit, can a State Court Judge, of his own motion, issue the injunction as prayed, staying the whole reorganization proceedings as to the leased railroad until the controversy between the minority stockholders and the company over the necessity for unani-

[15] 157 F. (2) 241.

mous stockholders' consent has been determined in the State Court?

The second one is: If the State Judge does issue such injunction, is the Reorganization Court bound to respect it, or may it, as it did here, determining for itself that under Georgia law the company could act by majority vote of its stockholders, issue its own orders nullifying the State Court injunction and protecting the officers of the leased railroad from the consequences of disobedience of it, thereby preventing the stoppage of the reorganization proceedings and the disrupting and failure of the plan?

The third question is: Was the District Judge right in deciding that unanimous consent of South Western's stockholders was not necessary, that majority consent was sufficient?

The opinion of the majority in stating the case as though the State Court jurisdiction had first attached, the State Court injunction had been first issued, that is as though it were the United States Judge, and not the State Judge, who had been guilty of a gross breach of comity here,[1] and, in failing to state that the State Court injunction was issued to stay action in the Reorganization proceeding after and in defiance of the issuance of the Federal Court in- [fol. 277] junction, puts the Federal District Judge in the invidious position in which the facts place the State Court Judge. In failing, too, to consider and decide the issue tendered and decided below, whether the judgment of the Reorganization Court, the court which, having jurisdiction of the reorganization *res*, had complete and exclusive jurisdiction of all questions as to the plan, its acceptance, and its carrying out, was right in declaring that, the majority of its stockholders consenting, the leased railroad had authority to accept under, and to transfer its property in accordance with, the reorganization plan, the opinion of the majority wholly fails to deal with and determine the real, the decisive question in the case.

The facts and issues, that is what really occurred below and what was contended and determined there, are set out with complete accuracy, and the legal conclusions which follow from them are stated with eminent correctness, in

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[1] Byran v. Speakman, 53 F(2) at 465; Farmers L & T Co. v. Lake St., 177 U. S. 51; Harkin v. Brundage, 276 U. S. at 43; 28 Am. Jur., Injunctions, at Sec. 217, et seq.

the findings of fact and conclusions of law of the District Judge. Their great length precludes me from adopting them, except by reference to the record, as my dissenting opinion. I can and will, however, setting them out in the margin [2] with the greatest possible brevity, rely heavily

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[2] Findings of Fact:

(1) Appellees are minority stockholders in South Western Railroad Company.

(2) That company is a railroad company originally incorporated under an act of the Assembly of Georgia in 1845, by a charter which makes no specific provision with respect to the sale of the company's railroad properties.

(3) In June, 1869, the company leased its railroads and their appurtenances to the Central Railroad and Banking Company of Georgia for and during its entire existence.

(4) The properties of this company, including the leasehold estate passed at receivership sale to Central of Georgia Railroad Company, the debtor in this case, and in October, 1895, the lease was renewed and modified for the term of 100 years, renewable in like periods for the same term forever, and Central continued to operate the leasehold property until Dec. 5, 1932, when a federal receiver was appointed.

(5) The receiver, adopting the lease, operated under it until June, 1940, when Central filed this railroad reorganization proceeding, and the trustees appointed in it took over.

(6) A plan of reorganization of the Central, which the Commission had found to be "compatible with the public interest", was promulgated by it, was approved by the court on June 25, 1946, and no appeal was taken from the order of approval.

(7) This plan allotting to South Western, if it accepted under it, bonds of the reorganized company, provided that if South Western did not accept under the plan, its lease should be disaffirmed as of such time at or prior to the consummation of the plan as the court may direct.

(8) South Western appeared specially in the reorganization proceedings: (1) to ask that its lease be adopted as part of the reorganization plan; (2) to contest before the Commission and the Court the allotment to it under the plan as proposed and finally approved; (3) to file (a) a claim for equipment which had not yet been determined, and

them, in pointing out the graceless enormity, the complete [fol. 278] absence of power, of the state district judge in

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(b) a petition for declaratory judgment as to its rights in the event its lease was rejected. This the court refused on the ground of the Commission's exclusive jurisdiction of the matter.

(9) South Western is solvent, no bankruptcy proceedings have been instituted against, no contention has been made at any time that South Western could be compelled to accept the plan, and no effort has been made to so compel it.

(10) On Feb. 11, 1947, the Commission submitted the plan to the creditors and leased lines, including South Western, for their acceptance or refusal on or before midnight, March 28, 1947.

(11) On March 13, 1947, the directors of South Western met and resolved that the plan be accepted subject to the assent of a majority of the stockholders and that when this had been given, "the officers of the company be, and they are hereby, authorized and directed to carry out the plan as authorized by Sec. 94-328 Code of Georgia, Annotated, of 1933."

(12) On March 25, 1947, Benton and another, minority stockholders of Southwestern, filed in the State Court of Bibb County a bill in equity against South Western and its directors, alleging that it was without power to accept the reorganization plan and carry it out by sale of its properties without the consent of all the stockholders, and praying that the stockholders be enjoined from meeting and accepting the plan, and if the stockholders be not restrained, the officers and directors of the company be enjoined "from filing with the District Court or the Commission" any acceptance of the plan and that they "be enjoined from doing and performing any act in behalf of South Western Railroad Company which might tend to consummate the plan of reorganization of control of Georgia Railway with respect to the acquisition of the properties of the South Western Railroad Co."

(13) A rule having issued to show cause and hearings having been had on March 26 and 27, the State Court did not enjoin the meeting of the stockholders or their acceptance of the plan but reserved his decision on all the matters argued.

attempting to stay the reorganization proceedings, and the nature and scope of the error of the majority opinion

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(14) On March 28, the stockholders met and by a two-thirds majority accepted the plan, and on that same day South Western in accordance with the resolution of its directors and stockholders mailed to the Commission its ballot accepting the plan.

(15) On April 18, 1947, no further action having been taken in the State Court suit, the trustee filed his bill in the Reorganization Court, calling to the attention of that court the pendency and nature of the Benton suit and asking that its further prosecution be enjoined as an interference with the reorganization proceedings, whereupon the district judge set the matter down, issuing the temporary injunction as prayed.

(16) On April 24, 1947, the judge of the State Court, reciting that the federal court had issued an injunction against the further prosecution of the suit, and, purporting to be acting on his own motion, issued a sweeping injunction against the defendants in the State Court suit based on his opinion that Southwestern had no charter power to sell its railroad without the unanimous consent of its stockholders. This injunction, in most sweeping terms, stayed South Western "from carrying into effect any provision for the sale or lease of the railroad properties of the defendant railroad company pursuant to any acceptance of any plan or any such sale or lease not authorized by a unanimous vote of the stockholders defendant company", and following precisely the prayer of Benton's petition, further enjoined the officers and directors from filing with the United States District Court, or the Interstate Commerce Commission, any acceptance of such plan, from selling to the reorganized company or to anyone else the properties of the railroad, and finally, *it provided "specifically that such officers and directors be, and they are hereby restrained and enjoined from doing and performing any act in behalf of the defendant railroad company which might tend to consummate the plan of the Central of Georgia Railroad Company with respect to the acquisition by that company of the properties of the South Western Railroad"*.

(17) Whereupon, the trustee amended his petition to bring this injunction to the attention of the Reorganization

[fol. 279] in giving aid and comfort to his obstructive acts. This error, which, as excerpts in the margin from the opin-
[fol. 280] ion [3] show, proceeds from the view that the jurisdiction possessed and exercised here is no more and no less than would be exercised in an ordinary bankruptcy proceeding, and that the *res* of which the Reorganization Court is said to be possessed and to have jurisdiction is merely physical properties of the debtor instead of, as is the law, *the res being the reorganization proceeding, including its controversies and questions and the plan it was instituted to bring about.*

Court and to present for adjudication by the Reorganization Court the question whether, under the laws of Georgia and the circumstances of this case, unanimous consent of the stockholders of South Western is a condition precedent to the acceptance of the plan by that company and its consummation by the conveyance of its property to the reorganized company. There was a prayer that the order of the Superior Court of Bibb County be annulled and declared void and that when the plan is confirmed by the court such orders may be passed as will make effective Southwestern's acceptance and consummation.

(18) On May 26, 1947, the case was heard, the right of South Western to agree to the plan and sell its properties without the unanimous consent of its stockholders was declared, and the injunction theretofore issued was made permanent. The temporary injunction issued by the judge of the State Court was declared null and void as in excess of that Court's jurisdiction and an invasion of the jurisdiction of the Reorganization Court.

[3] Contrast the statement of the majority opinion, that "Section 77 of the Act, and kindred legislation, did not alter, lessen, or abolish the several distinct classes of jurisdiction exercised by the bankruptcy court. * * * The exclusive jurisdiction of the district court in reorganization proceedings is that which bankruptcy courts have customarily possessed. In entering the judgment in this case, annulling and staying proceedings in the state court, the bankruptcy court undertook in a summary proceeding to exercise exclusive jurisdiction in rem as to tangible property that the trustee did not own but was seeking to acquire."

As the conclusions of law of the District Judge, excerpts from which I have set out in the margin,[4] show, he saw [fol. 281] with great clearness what the majority opinion not only failed to see but denied, (note 3) that "A proceed-

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[4] These are in abbreviated form:

(1) South Western is a creditor of Central, and is a party to the reorganization proceeding and to the plan for all purposes connected with it.

(2) The purpose, and, if the state court injunction had been allowed to stand, the effect of the suit of Benton in the State Court, was to completely disrupt the reorganization proceeding by preventing the consummation of the plan.

(3) "The judicial process in Bankruptcy proceedings under Sec. 77 is, as it were, brigaded with the administrative process of the Commission". Palmer v. Mass. 308 U. S. 579, 587, quoted in Smith v. Hoboken, 328 U. S. 123, 132. "The judicial functions of the Bankruptcy Court and the administrative functions of the Commission work co-operatively in reorganization." Warren v. Palmer, 340 U. S. 132, 137, 138.

(4) The acceptance of the plan by South Western involves its merger or consolidation and conveyance of its properties to the reorganized Company. The plan expressly provides that this shall be done if the plan is accepted by South Western.

(5) The Bankruptcy Court and the Commission under the Federal Statutes have exclusive control of the matter of the merger or consolidation of South Western with the reorganized Company and the sale of the railroads of South Western to the reorganized Company. The proposal is made in the reorganization proceeding, and the acceptance or rejection must be made in the reorganization proceeding. What vote of stockholders is sufficient to authorize the South Western to act; the validity of its acceptance, and the validity of the acceptance, and the validity of the conveyance to be made in consummation of the Plan are all questions for the Bankruptcy Court and the Commission."

"We hold that this Court as a Court of Bankruptcy, in connection with the powers conferred upon the Interstate Commerce Commission, has sole and exclusive jurisdiction in this matter, and that the attempt of the Plaitniff in the State Court suit to present the consummation of the Plan as

ing under Sec. 77 is not an ordinary proceeding in bankruptcy. *It is a special proceeding which seeks only to bring reorganization if a satisfactory plan to that end can be devised and to prevent the attainment of that object is to defeat the very end, the accomplishment of which was the sole aim of the section and thereby to render its provisions*

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it affects South Western, is an interference with the exclusive and prior jurisdiction of this Court."

(6) "The Court, having exclusive jurisdiction of the subject matter, has power to issue an injunction to prevent defeat or impairment of its jurisdiction, and this power is inherent in a Court of Bankruptcy, as it is in a Court of Equity. Continental Bank & Tr. Co. v. Rock Island Ry. Co., 294 U. S. 648, 675. Ex Parte Baldwin, 291 U. S. 610, 615. Thompson, Tr., v. Magnolia Petroleum Co., 309 U. S. 478."

(7) "In this matter the State Court acted in excess of its jurisdiction, and under the authorities such acts are void and can be annulled by the decree of the Court which has exclusive or prior jurisdiction. 21 C. J. S. pp. 176, 177, 178; French v. Hay, 22 Wall. 250; Kalb v. Feuerstein, 308 U. S. 433; U. S. v. Walker, 109 U. S. 258 and cases cited."

(8) "South Western Railroad Company, in holding the stockholders meeting, was acting under Code Sections 94-328 and 94-329 of the Code of Georgia of 1933. * * *. These Code Sections do not purport to amend any charter of any Corporation. They are laws of general operation and any corporation which comes within its terms may avail itself of the Code Sections. It is not necessary for the South Western Railroad Company by a vote of its stockholders to accept these Code Sections as a part of its charter. These Code Sections do not in any sense impair any obligation of the contract as between the stockholders themselves. In the exigencies stated in the Code Sections the Corporation may sell its property on the vote of a majority of its stockholders. This does not impair the contract among the stockholders. It is a safety valve for them, in case the corporation finds itself in the predicament stated in the Code Sections. South Atlantic L. & S. Corp. v. Norton, 149 Ga. 805, 812."

"There is no law of the State of Georgia which requires unanimous consent of stockholders to enable a railroad com-

futile." (Emphasis supplied.) *Cont. Bank & Trust Co. v. Rock Island*, 294 U. S. 648.

[fol. 282] He saw, with complete clarity too, that under the controlling decisions of the Supreme Court of the United States,[5] the *res* of which the Reorganization Court has exclusive jurisdiction is not merely, or even mainly, the physical properties of the debtor railroad. It is the *proceeding for its reorganization*, including all claims, issues and controversies affecting or relating to *the plan of reorganization, the prime res in the proceeding*, its formulation, acceptance and carrying out. Because he saw this so clearly he saw that the control, the jurisdiction, which as judge of the Reorganization Court he had and must exercise, was a jurisdiction absolutely exclusive and complete over all questions and controversies, the decision of which would or might affect, delay, consummate, or interfere with the consummation of *the plan*. A few quotations from the controlling authorities will, I think, make this completely clear.

In *Continental Bank & Trust Co. v. Rock Island*, *supra*, at p. 671, the court said:

> "Section 77 advances another step in the direction of liberalizing the law on the subject of bankruptcy. Rail-

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peny to sell its railroad. There is no law and no decision of the Courts of Georgia which hold that under no circumstances can a railroad or other corporation transfer all of its property without the unanimous consent of its stockholders."

"The Code Sections are consent on the part of the State that under the circumstances stated in the Code Sections the Railroad Company may sell all of its railroad. So that with this consent on the part of the State, this quasi public corporation stands in the same position so far as the sale of its property is concerned, as would any private corporation."

(9) "In the exigencies which confront the South Western, it clearly has power to sell its property to the newly Reorganized Company without the unanimous consent of its stockholders."

[5] Const. Bank & Trust Co. v. Rock Island, 294 U. S. 648; Thompson v. Texas Mexican Ry. Co., 328 U. S. 134; Smith v. Hoboken Ry. Co., 328 U. S. 123; and Gardner v. New Jersey, 329 U. S. 565.

> way corporations had been definitely excluded from the operation of the law in 1910 * * * probably because such corporations could not be liquidated in the ordinary way or by a distribution of assets. A railway is a unit; it can not be divided up and disposed of piecemeal like a stock of goods. It must be sold, if sold at all, as a unit and as a going concern. Its activities cannot be halted because its continuous, uninterrupted opera- [fol. 283] tion is necessary in the public interest; and for the preservation of that interest, as well as for the protection of the various private interests involved, reorganization was evidently regarded as the most feasible solution whenever the corporation had become 'insolvent or unable to meet its debts as they mature.' "

Then posing the question whether the bankruptcy court had authority to enjoin the sale of collateral, held under pledge by banks and the Reconstruction Finance Corporation, "if a sale would so hinder, obstruct and delay the preparation and consummation of a plan of reorganization as properly to prevent it", the court answered the question in the affirmative, saying, at page 676:

> "It may be that in an ordinary bankruptcy proceeding the issue of an injunction in the circumstances here presented would not be sustained * * *. 'But a proceeding under Section 77 is not an ordinary proceeding in bankruptcy."

In *Gardner v. New Jersey*, 329 U. S. 565, a railroad reorganization proceeding, the court declared:

> "The reorganization court has jurisdiction over all property of the debtor including that on which the State asserts a lien and can adjudicate all questions and issues raised by objections to the State's claim, including the validity and priority of liens whether or not claimed by the State."

These decisions, bottomed as they are upon the view that the Reorganization Court has sweeping and all inclusive jurisdiction over all claims and controverises which arise out of or attend upon the formulation of a plan and its [fol. 284] bringing to fruition, leave in no doubt whatever that the State judge was the intruder without right in the contest of jurisdiction below.

> "It would fly in the teeth of Sec. 77(a), which grants the reorganization court 'exclusive jurisdiction of the debtor and its property wherever located.' That jurisdiction is not limited to the prevention of interference with the use of the property by the trustee; it 'extends also to the adjudication of questions respecting the title'. Ex parte Baldwin, 291 U. S. 610, 616; Thompson v. Texas Mexican Ry. Co., 328 U. S. 134, 140. It is the exclusive jurisdiction of the reorganization court which gives it power to preserve the railway as a unit and as a going concern and to prevent it from being divided up and dismembered piecemeal. Only in that way can continuous operation of the road be assured and a plan of reorganization be effected which not only safeguards the interests of the various claimants but is also compatible with the public interest. * * *"
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> "When Sec. 77 is read against this historical background and in light of practical requirements, we cannot conceive that Congress gave the reorganization court power less replete than the sweeping language of Sec. 77 suggests." Gardner v. New Jersey, 329 U. S. at 577.

The majority opinion has not decided this case in the light of these broad and catholic views. It has treated it as an ordinary proceeding in an ordinary bankruptcy, and has pitched its decision of it on the small and meager, the wholly irrelevant, question of whether "the bankruptcy court had jurisdiction *in rem* of property, the conveyance of which has been enjoined by the state court", and its answer, that since [fol. 285] South Western was not in bankruptcy, the court did not have. The question had no place in this proceeding. The answer to it, reversing the judgment in this case, was wrong.

Perhaps the basic error of the majority opinion, the error from which all other errors flow, is its holding that the suit in the State Court, which the judgment appealed from enjoined, was a mere proceeding *in personam*. It was in fact in no sense such. It was a proceeding by use of the injunctive process of the State Court to bring to a complete stop all the proceedings in the Court of Reorganization and thus prevent the consummation of the plan. To prevent this direct and positive interference by force, the force of a state court injunction, with the whole *in rem* proceeding, the reorganization itself, the federal court was compelled to exercise

its exclusive jurisdiction to stay the disruptive State Court proceedings and, taking cognizance of the controversy as to whether South Western could accept the plan and carry it out, determine that controversy for itself. It did determine it favorably to the acceptance of the plan. That determination was right, and the judgment should have been affirmed. I dissent from its reversal.

[fol. 286] IN UNITED STATES CIRCUIT COURT OF APPEALS, FIFTH CIRCUIT

No. 12130

L. O. BENTON, JR., et al.,

versus

MERREL P. CALLAWAY, as Trustee, of the Property of Central of Georgia Railway Company, Debtor, et al.

JUDGMENT—January 13th, 1948

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Southern District of Georgia, and was argued by counsel;

On consideration whereof, It is now here ordered, adjudged and decreed by this Court that the judgment of the said District Court appealed from in this cause be, and the same is hereby, reversed, the injunction dissolved; and that said cause be, and it is hereby, remanded to the said District Court for further proceedings not inconsistent with the opinion of this Court;

It is further ordered, adjudged and decreed that the appellees, Merrel P. Callaway, as Trustee of the Property of Central of Georgia Railway Company, debtor, and another, be condemned, in solido, to pay the costs of this cause in this Court, for which execution may be issued out of the said District Court.

"Hutcheson, Circuit Judge, dissents."

[fol. 287] IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

[Title omitted]

MOTION AND ORDER STAYING MANDATE PENDING APPLICATION FOR CERTIORARI—Filed January 30th, 1948

Now come Merrel P. Callaway, as Trustee of the property of Central of Georgia Railway Company, and South Western Railroad Company, a Corporation, Appellees herein, and respectfully show to the Court as follows:

1. Petitioners intend to petition the Supreme Court of the United States to review on writ of certiorari the decision of this Court rendered January 13, 1948, in the above stated case, and show unto this Court that it is necessary that the mandate of this Court should be stayed pending the decision of the Supreme Court of the United States on said application for the writ of certiorari and until the determination of the case by the Supreme Court of the United States in case said writ should be granted.

[fol. 288] 2. Petitioners therefore pray that the mandate of this Court in said case shall be stayed as above set forth.

3. Petitioners tender herewith bond payable to the Appellants herein conditioned as provided by law.

This 26 day of January, 1948.

T. M. Cunningham, A. R. Lawton, Jr., Walter A. Harris, Attorneys for Merrel P. Callaway, as Trustee of the Debtor. Wallace Miller, Attorney for South Western Railroad Company.

I have this day served a copy of the within petition and of the bond tendered herewith on the Attorney for the Appellants by mailing copies thereof to him.

January 26, 1948.

A. R. Lawton, Jr.

[fol. 289] Read and considered. It is ordered that the mandate of this Court be stayed for a period of thirty (30) days to permit application for writ of certiorari to be made to the Supreme Court of the United States. If such application be made within the thirty-day period, it is further or-

dered that the mandate be stayed until the determination of the case by the Supreme Court of the United States.

The bond tendered by petitioners is approved and ordered filed.

This the 30 day of January, 1948.

(Signed) Elmo P. Lee, Judge, United States Circuit Court of Appeals for the Fifth Circuit.

[fols. 290-291] Bond on stay, approved and filed Jan. 30, 1948, omitted in printing.

[fol. 292] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 293] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed March 15, 1948

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on Cover: File No. 52,837. U. S. Circuit Court of Appeals, Fifth Circuit. Term No. 607. Merrel P. Callaway, as Trustee of the Property of Central of Georgia Railway Company, Debtor, et al., Petitioners, vs. L. O. Beaton, Jr., et al. Petition for writ of certiorari and exhibit thereto. Filed February 18, 1948. Term No. 607, O. T., 1947.

SUPREME COURT, U.S.

No. 607 21

Office - Supreme Court, U. S.
FILED
FEB 18 1948
CHARLES ELMORE CROPLEY
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

MERREL P. CALLAWAY, as Trustee of the Property of Central of Georgia Railway Company, Debtor, et al.

Petitioners;

vs.

L. O. BENTON, JR., et al.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO UNITED STATES CIRCUIT COURT OF APPEALS, FIFTH CIRCUIT AND BRIEF IN SUPPORT THEREOF

T. M. CUNNINGHAM,
26 Bryan Street, East
Savannah, Ga.

A. R. LAWTON, JR.
26 Bryan Street, East
Savannah, Ga.

WALTER A. HARRIS,
Persons Building
Macon, Ga.
Attorneys for Merrel P. Callaway, Trustee.

WALLACE MILLER,
Persons Building
Macon, Ga.
Attorney for South Western Railroad Company.

IN THE

SUPREME COURT OF THE UNITED STATES

MERREL P. CALLAWAY, as Trustee of the Property of Central of Georgia Railway Company, Debtor, et al.

Petitioners,

vs.

L. O. BENTON, JR., et al.,

Respondents.

TO THE HONORABLE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Merrel P. Callaway, as Trustee of the property of Central of Georgia Railway Company, and South Western Railroad Company, respectfully petition that a Writ of Certiorari may issue to the United States Circuit Court of Appeals, Fifth Circuit, to bring up the record from and to review the judgment of that Court rendered January 13, 1948, in the case of L. O. Benton, Jr., et al., Appellants, v. Merrel P. Callaway, as Trustee of the property of Central of Georgia Railway Company, Debtor, et al., Appellees, No. 12,130, and that the judgment in said case may be reviewed and reversed, and in support of this petition respectfully show:

1. This Court has jurisdiction to review the judgment in question under Judicial Code Section 240, as amended (U.S.C.A. Title 28 Sec. 347).

2. The facts are all contained in the findings of fact of the District Court (R. 59-74), and in a stipulation (R. 98-100). There are no facts in dispute.

3. That L. O. Benton, Jr., et al., Stockholders of South Western Railroad Company, brought a proceeding in the Superior Court of Bibb County, Georgia against South Western Railroad Company and its Officers and Directors, the sole purpose of which was to interfere with and prevent the consummation of the Reorganization Plan of Central of Georgia Railway Company as to the acquisition by the reorganized Company of the railroad properties of South Western (leased by Central) which are an important part of the Plan; that the State Court has no jurisdiction of the subject matter, and that the State Court suit is an invasion of the prior and exclusive jurisdiction of the Bankruptcy Court and the Commission. The District Court enjoined this State Court proceeding. The Court of Appeals by a majority decision (Judges Holmes and Lee concurring, and Judge Hutcheson dissenting) has sanctioned the proceeding in the State Court, and it is this decision of which we complain.

4. Central of Georgia Railway Company (hereinafter called "Debtor"), is being reorganized in a proceeding instituted by it under Section 77 of the Bankruptcy Act, as amended, in the United States District Court for the Southern District of Georgia, Savannah Division.

5. The Plan of Reorganization (hereafter referred to as the "Plan") of the Debtor has been approved by the Court, voted on by the creditors, and confirmed by the Court, and is awaiting consummation.

6. The Plan provides for acquisition of the railroad properties of South Western Railroad Company (hereafter called "South Western") by the reorganized Company, in exchange for certain securities to be issued by the reorganized Company. South Western comprises about 340 miles and has been under lease to Central and its predecessor since June 24, 1869, and is an important and integral part of the Central System, and is being operated by the Trustee of the Debtor. It is optional with South Western whether it accepts or rejects the Plan, but if it rejects it, the Plan provides that the lease shall be disaffirmed. The Plan further provides that if South Western is acquired, its railroad, the personal property appurtenant thereto, and all real estate shall be conveyed to the reorganized Company and that South Western shall waive all damages on account of any breach of lease and shall waive all claims in respect of equipment.

7. The law of Georgia provides that any railroad corporation organized under the laws of Georgia which has heretofore leased its property for a long term of years to another corporation, which lease has terminated, and the lessor is not a going concern or equipped to conduct the operation of a railroad company, is hereby authorized to sell or lease its property, rights, and franchises to another railroad corporation, upon such terms as may be agreed upon by the Board of Directors of the selling or lessor corporation and assented to by the holders of a majority of its stock. (Georgia Laws 1933, p. 235; Code of Georgia of 1933, Sect. 94-328).

8. As authorized by the above-quoted provision of the Georgia law, and in pursuance thereof, the Directors

of South Western resolved to accept the Plan, subject to the assent of the holders of a majority of its stock, which was given at a meeting of the stockholders held March 28, 1947, 30,137 shares of stock being voted in favor of acceptance and 9,057 shares against. The capital Stock of South Western consists of 51,911 shares. South Western duly notified the Commission of its acceptance of the Plan on March 28, 1947.

9. The Directors of South Western resolved to accept the Plan subject to the assent of the majority of the stock, which was given at a meeting of the Stockholders held March 28, 1947, 30,137 shares of stock being voted in favor of acceptance, and 9,057 shares against. The Capital Stock of South Western consists of 51,191 shares. South Western duly notified the Commission of its acceptance of the Plan.

10. March 25, 1947, L. O. Benton, Jr., et al., Stockholders of South Western, brought a petition in Equity in the Superior Court of Bibb County, Georgia, against South Western and its Officers and Directors. The gravamen of this case was that the Charter of South Western contained no authority to sell and convey all its railroad property; that a sale of its property was, therefore, ultra vires; and that no subsequent legislation could confer power to sell without impairing the obligations of the contract as among the Stockholders. The prayers of this petition were that the South Western Stockholders' meeting which was to be held March 28, 1947, should be enjoined, and that if this meeting was not enjoined and the Stockholders should vote by a majority to accept the Plan, that then the Defendants should be enjoined from doing anything which might tend to

consummate the Plan with respect to acquisition of the property of South Western. A rule was issued on this petition which was argued on March 26th and 27th, and the Court then adjourned the hearing without taking any action on the petition.

11. April 18, 1947, Merrel P. Callaway, as Trustee of the Debtor, filed a proceeding in the Bankruptcy Court against L. O. Benton, Jr., et al., Plaintiffs in the above stated suit in the State Court, and against South Western, to enjoin the further prosecution of the State Court suit, on the grounds that the Bankruptcy Court and the Commission were engaged in reorganizing a railroad and that they had exclusive jurisdiction over the Plan and its execution and consummation, and that the Commission had exclusive and plenary jurisdiction of the acquisition of one railroad by another, and that the State Court proceeding was an attempt to interfere with and frustrate the Plan as to acquisition of South Western; that the State Court had no jurisdiction, whatever, over the matter of the acquisition of one railroad by another; and that the Bankruptcy Court and the Commission had prior and exclusive jurisdiction over the subject matter. On this petition the Judge of the District Court granted a temporary restraining order against the Respondents.

12. April 24, 1947, the Judge of Bibb Superior Court, of his own motion issued an opinion and an interlocutory injunction in the Benton case (R. 246). He held that South Western had no power to convey its property and issued an order that South Western and its Officers and Directors were enjoined from carrying into effect any conveyance of the property of the

South Western "not authorized by a unanimous vote of the Stockholders" of South Western, from accepting the Plan (which had already been accepted), and "from doing or performing any act in behalf of the Defendant Railroad Company which might tend to consummate the Plan of Reorganization of the Central of Georgia Railway Company, with respect to the acquisition by that Company of the properties of South Western Railroad Company."

13. Thereupon, on May 26, 1947, the Trustee of the Debtor amended his petition and called the attention of the Bankruptcy Court to the order of the State Court Judge, and alleged that the said injunction of the State Court was in excess of the jurisdiction of the Superior Court of Bibb County, and invades the exclusive jurisdiction of the Bankruptcy Court and is an attempt to prevent South Western from consummating its acceptance of the Reorganization Plan; and, accordingly, the amended petition prayed: (a) that the Court would adjudicate the question whether under the circumstances of this case, it is the law of Georgia that South Western could not accept the Plan and convey its property in pursuance of the Plan without unanimous consent of its Stockholders; (b) that the Court would decree that if it is the law of Georgia that unanimous consent of stockholders is necessary in the premises, that under the powers conferred on the Bankruptcy Court and the Commission which are superior to the State laws, that the South Western may, notwithstanding, accept and consummate the Plan; (c) that the order of the Judge of the Superior Court may be annulled and be adjudged to be null and void, and that when the Plan is confirmed, the Court will

pass such order as will make effective the acceptance and consummation by South Western and its Officers and Directors. After argument, the Bankruptcy Court August 15, 1947, granted a permanent injunction against the Plaintiffs in the State Court case from prosecuting that case, and declared the injunction granted in the State Court case null and void and of no effect. L. O. Benton, Jr., et al., appealed to the United States Circuit Court of Appeals, Fifth Circuit, from this judgment.

14. The majority opinion of the Circuit Court of Appeals which holds that the Bankruptcy Court did not have prior and exclusive jurisdiction over the controversy, and the judgment of the said Court of Appeals is erroneous on the following grounds:

(a) because South Western is a creditor of the Debtor, holding a claim against the Debtor under an unexpired lease;

(b) because the Commission's Plan, approved by the Court, provided that unless South Western accepted the provisions of the Plan with respect to the sale of its railroad properties to the reorganized Company, its lease would be disaffirmed;

(c) because the Commission has the power under the Bankruptcy Act to prescribe in its Plan of Reorganization of the Debtor the conditions upon which the executory contracts of the Debtor, including unexpired leases, may be rejected.

(d) The sole and only purpose of the suit of L. O. Benton, Jr., et al., in the State Court was to

interfere with and defeat the Plan of Reorganization as it related to South Western.

(e) The holding of the Court of Appeals that the res was the reversionary interest of South Western in its leased property, and this not being in the possession of the Bankruptcy Court, that the State Court had jurisdiction to decide the question whether South Western could convey this interest without unanimous vote of its Stockholders, involves a total misconception of the scope of a reorganization plan and the function of the Bankruptcy Court and the Commission with respect to creditors of the Debtor.

(f) The res before the Bankruptcy Court is the reorganization proceeding, and all the claims, issues and controversies relating to and affecting the formulation, acceptance and carrying out the Plan, as is forcefully stated by Judge Hutcheson, in his dissenting opinion.

(g) The statement in the majority opinion, that the Benton case and the injunction that was annulled were strictly a suit in personam, is not correct. The sole and only purpose of the Benton case was to defeat the Plan of Reorganization as it related to South Western. The decree sought by the Benton case was that South Western could not convey its property and that, therefore, it could not accept the Plan of Reorganization which contemplated the acquisition of its property. The Benton case proposed to operate upon the Plan and to destroy it as to South Western, by enjoining South Western from accepting the Plan. As the res before the Bankruptcy Court was

the Reorganization Plan, the Benton case was a proceeding against the Plan, and the Benton case was in substance and effect an in rem proceeding. But whether it was or not, it was an invasion of the exclusive jurisdiction of the Bankruptcy Court. The decision in this respect is directly contrary to the decisions of this Court in the cases of Continental Bank & Trust Co. v. Rock Island Ry. 294 U.S. 648, 675, 676; Warren v. Palmer 310 U.S. 132, 137, 138; Gardner, Trustee v. New Jersey 329 U.S. 565, 577; Smith v. Hoboken R.R. Co. 328 U.S. 123, 130; Thompson, Trustee v. Texas Mexican Ry 328 U.S. 134, 142, 143.

(h) The jurisdiction of the Interstate Commerce Commission under Section 5 (11) of the Interstate Commerce Act is exclusive and plenary over the merger and consolidation of railroads and the acquisition of one railroad by another, and under this section, carriers are relieved from the "restraints, limitations and prohibitions of law, Federal and State or municipal in so far as may be necessary to enable them to carry into effect" the transaction approved by the Commission. The Plan provides in its last paragraph (as is usual in all Plans), "That nothing herein contained shall be or be construed as a grant of authority for the issue of any securities, assumption of obligations, *transfer of property,* sale, consolidation or merger of the Debtor's property * * until further action by the Commission upon confirmation of the Plan by the Court" (R. 64). This language is taken from Sub-Section (f) of Section 77 of the Bankruptcy Act. It is for the Commission to find whether the proposed acquisition is supported by proper corporate authority, and the Commission would certainly have power to

relieve against unanimous consent of Stockholders. No Court, State or Federal, has power to usurp this exclusive and plenary power of the Commission. The Commission has expressly reserved this power in the Plan. The majority opinion disregards this question altogether, although it was expressly decided by the District Court. The majority opinion has expressly sanctioned the jurisdiction of the State Court over this matter, although under the Federal law it is expressly reserved to the Commission. The failure of the majority opinion to give effect to the exclusive power of the Commission is directly contrary to the decisions of this Court in the cases of *Thompson, Trustee*, v. *Texas-Mexican Ry. Co.*, 328 U.S. 134; and *Smith* v. *Hoboken R.R. Co.*, 328 U.S. 123; *Palmer, Trustee* v. *Mass.* 308 U.S. 79; *Texas* v. *United States* 292 U.S. 522; *Cleveland, CC & St. L. Ry.* v. *United States* 275 U.S. 404; *New York Central Securities Co.* v. *United States* 287 U.S. 12, 26, 27. The District Court had the right and duty to enjoin the State Court proceeding on this ground, because the Court and the Commission work cooperativley in reorganization. *Palmer* v. *Mass.*, 308 U.S. 79, 87; *Smith* v. *Hoboken*, 328 U.S. 123, 132; *Warren* v. *Palmer*, 310 U.S. 132, 137, 138.

(i) The majority opinion is contrary to and does not consider (1) the provisions of Sub-Section (b) of Section 77 of the Bankruptcy Act, which provides that a plan of reorganization "shall provide adequate means for the execution of the Plan, which may include the transfer of any interest in or control of all or any part of the property of the Debtor to another corporation or corporations, the merger or consolidation of the Debtor with another corporation or cor-

porations, etc."; (2) the provisions of sub-section (f) of Section 77 of the Bankruptcy Act which grant authority to carry out the Plan under the supervision and control of the Judge "the laws of any State or the decision or order of any State authority to the contrary notwithstanding"; (3) the provisions in the Plan which give the District Court the power to construe it.

(j) The Commission has the power under Section 5 (11) of the Interstate Commerce Act to authorize the acquisition, even if the law of Georgia should prohibit it, or if the acquisition requires unanimous consent under the law of Georgia, because the Federal law is superior to the State law in this matter.

(k) The majority opinion erred in stating: "For the Bankruptcy Court to hold that a majority vote of the Stockholders of South Western would be sufficient, regardless of State law, would amount to amending the Plan in the face of the Statute which provides that no plan shall be approved or confirmed by the Judge 'unless the Plan shall have first been approved by the Commission and certified to the Court' ". The Plan has been promulgated by the Commission, and the Court long ago approved the Plan. Certainly, it is competent for the District Court to decide that the Commission has power to approve and allow the acquisition, notwithstanding the Georgia law may be as stated by the State Court Judge, that South Western cannot convey its property without unanimous Stockholder consent. The decision of the Bankruptcy Court does not amend the Plan. The Commission is yet to pass on the question of transfer of property as we have pointed out. The majority opinion in substance and effect turns the State Court loose to decide a question

over which the Commission has exclusive and plenary authority.

(l) The majority opinion erred in holding that the question submitted to the State Court "was peculiarly a question of State law". The question is solely one of Federal law. If it was dissociated from the Reorganization Plan, it would have been peculiarly a question of State law, but when the question relates to the Reorganization Plan it ceases to be a question of State law and becomes a question of Federal law.

(m) The observation of the majority opinion that "A solvent corporation * * cannot be constitutionally compelled against its will to convey to the debtor, etc." is irrelevant. No one is seeking to compel South Western to convey its property "against its will". The Directors of the Corporation and a large majority of the Stockholders are willing and anxious to convey the property. A small minority is seeking to prevent the Corporation from consummating the Plan as it relates to South Western. The District Court simply says that in its opinion this small minority cannot lawfully do this.

(n) The majority opinion states: "There is nothing in the plan to indicate that an ultra vires acceptance is authorized or required or that any State law which prohibits acceptance should be disregarded. The Plan does not provide that the leased lines may be acquired by a simple majority vote of the Stockholders of the Company". Naturally the Plan did not carry any such provision as suggested. No one ever mooted any incapacity on the part of South Western until the Benton case was filed. Moreover, the matter is one for the exclusive jurisdiction of the Commission

when it comes finally to approve the transfer of properties, and we do not imagine that the question will present any difficulty to the Commission.

(o) The acceptance or rejection by South Western, the conveyance of its property, the disaffirmance of the lease, the waiver of damages for breach of the lease and the waiver of claims for equipment, are all within the framework of the plan over which the Bankruptcy Court necessarily has exclusive jurisdiction.

(p) Under the provisions of Sections 94-328 and 94-329 and Sections 94-311 and 94-318 of the Code of Georgia (which are copied in the Appendix of the brief attached to this petition), South Western is authorized to sell its property to the reorganized Company with the assent of a majority of its stock.

(q) Under the exigencies which confront South Western, it has power under Georgia law to convey its property on the vote of a majority of its stock; and this question having been submitted to the Bankruptcy Court and all the necessary parties being before the Bankruptcy Court, it was its right and duty to pass on the question, and the Court of Appeals should have affirmed its action and decision on this question.

(r) The Court erred in holding that a summary proceeding did not lie in the case.

13. The Fifth Circuit Court of Appeals has decided the Federal questions in this case in a way which conflicts with the applicable decisions of this Court (as will appear from the decisions cited herein and in the supporting brief), and has so far departed from the accepted and usual course of judicial proceeding under Section 77 of the Bankruptcy Act, and has so far sanc-

tioned such a departure by a State Court as to call for an exercise of this Court's power of supervision.

14. This petition is accompanied by a certified transcript of the record in the Circuit Court of Appeals, Fifth Circuit, including the proceedings in that Court, in the case of L. O. Benton, Jr., et al., Appellants, vs. Merrel P. Callaway, as Trustee of the property of Central of Georgia Railway Company, Debtor, et al., Appellees, No. 12,130; and ten (10) additional copies thereof. A supporting brief is attached hereto.

WHEREFORE, Petitioners pray that a Writ of Certiorari may be directed to the Fifth Circuit Court of Appeals to bring up the record in said case and to review the decision of that Court in said case, and that the judgment of the Court of Appeals therein may be reversed and set aside.

This 12th day of February, 1948.

Respectfully submitted,

T. M. CUNNINGHAM,
26 Bryan St., East, Savannah, Ga.

A. R. LAWTON, JR.
26 Bryan St., East, Savannah, Ga.

WALTER A. HARRIS,
Persons Building, Macon, Ga.
Attorneys for Merrel P. Callaway, Trustee of the Debtor.

WALLACE MILLER,
Persons Building, Macon, Ga.
Attorney for South Western Railroad Company.

IN THE

SUPREME COURT OF THE UNITED STATES

MERREL P. CALLAWAY, as Trustee of the Property of the Debtor, et al.

Petitioners,

VS.

L. O. BENTON, JR., et al.,

Respondents.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

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IN THE

SUPREME COURT OF THE UNITED STATES

MERREL P. CALLAWAY, as Trustee of the Property of Central of Georgia Railway Company, Debtor, et al.,
Petitioners,

vs.

L. O. BENTON, JR., et al.,
Respondents.

Petition for Writ of Certiorari

BRIEF IN SUPPORT OF THE PETITION

JURISDICTION OF THIS COURT.

The petition seeks a writ of certiorari to the United States Circuit Court of Appeals, Fifth Circuit, in the case of L. O. Benton, Jr., et al., Appellants, vs. Merrel P. Callaway, as Trustee of the property of Central of Georgia Railway Company, Debtor, and South Western Railroad Company, Appellees, No. 12,130.

This Court has jurisdiction to review the judgment in question under Judicial Code Section 240, as amended, (U.S.C.A., Title 28, Section 347).

Neither the case in the United States District Court nor in the Court of Appeals is reported. The decision of the District Court is in the Record, p. 48, et seq., and the decision of the Court of Appeals is attached to the record.

STATEMENT OF THE CASE.

There are no facts in dispute. The facts are contained in the findings of fact by the District Court (R. 48-74) and in a stipulation (R. 98-100).

The Central of Georgia Railway Company (herein called the debtor) is being reorganized under Section 77 of the Bankruptcy Act. The Commission's plan of reorganization of the debtor was approved by the reorganization court on June 24, 1946. Under the approved plan, which has been confirmed and is awaiting consummation, South Western Railroad was allotted certain securities of the reorganized company in exchange for its railroad properties. The plan provided that South Western should accept or reject its provisions on or before March 28, 1947, or waive its right thereafter either to accept or reject the plan. The plan further provides that if South Western failed to accept the plan its lease would be disaffirmed. South Western accepted the plan on March 28, 1947, on a majority vote of its stockholders, as authorized and provided by applicable State statute. (Code of Georgia of 1933, Sect. 94-328, copied in Appendix 2 of this brief). The railroads of South Western have been leased to the debtor for many years and are in the possession of the debtor's trustee. This leased line is an important and integral part of the system of the debtor, and the Commission has found that it is in the public interest that it should be acquired by the reorganized Company.

L. O. Benton, Jr., et al., minority stockholders of South Western, brought a suit in equity in the Superior Court of Bibb County, Georgia, against South Western and its Officers and Directors to enjoin the conveyance

by South Western of its property to the reorganized Company, and to enjoin the consummation of the Plan as it relates to South Western (R. 133-165). The gravamen of this suit is that South Western has no power under its Charter to divest itself of its railroad. A rule to show cause, why an interlocutory injunction should not be granted, was issued (R. 161). A hearing was had on the rule to show cause but before any decision was had thereon, Merrel P. Callaway, as Trustee of the Debtor, brought a summary, ancillary proceeding in the United States District Court for the Southern District of Georgia, (in which the Bankruptcy case was pending) against L. O. Benton, Jr., et al., to enjoin them from further prosecuting their case in the State Court on the grounds that the Bankruptcy Court and the Interstate Commerce Commission had prior and exclusive jurisdiction of the subject matter of the suit of L. O. Benton, Jr., et al. South Western was also made a party to this proceeding (R. 1). The District Judge issued a temporary restraining order on this petition (R. 10).

Thereafter the State Court Judge of his own motion issued an interlocutory injunction against South Western and its Officers and Directors enjoining them from accepting the Plan (although South Western had already accepted the Plan), from making any conveyance of its property and from taking any action to consummate the Plan of Reorganization as it related to South Western, except upon unanimous consent of its stockholders (R. 246-249).

Thereupon Merrel P. Callaway, as Trustee of the Debtor amended his petition and called the attention of the District Court to the injunction of the State

Court Judge and prayed that it should be adjudged to be null and void as an invasion of the prior and exclusive jurisdiction of the Bankruptcy Court and the Commission; and all the parties being before the Bankruptcy Court, this amended petition further prayed that the District Court would adjudicate the question whether South Western could convey its property and accept the Plan without unanimous consent of its stockholders. (R. 32). The District Court, after hearing, issued its order that it and the Commission had prior and exclusive jurisdiction, that the order of the State Court Judge was null and void, and that L. O. Benton, Jr., et al., and all other stockholders of South Western should be perpetually enjoined from prosecuting the suit or any similar suit, except in the Bankruptcy Court (R. 92). The Court in its opinion held that South Western had power under the circumstances of this case to convey its property on the vote of a majority of the stock of the Company (R. 86-88).

L. O. Benton, Jr., et al., appealed to the United States Circuit Court of Appeals, Fifth Circuit, and that Court in a majority opinion rendered January 13, 1948, by Judges Holmes and Lee (Judge Hutcheson dissenting), decided that the judgment appealed from should be reversed, the injunction dissolved, and the Cause remanded for further proceedings not inconsistent with the opinion. The petition for certiorari seeks to bring this decision before the Supreme Court for review and reversal.

ASSIGNMENTS OF ERROR

Error is assigned on the decision and judgment of the Circuit Court of Appeals, Fifth Circuit, in the above stated case as follows:

(1) South Western is a creditor of the Debtor and a party to the reorganization proceedings.

(2) The Commission's Plan approved by the Court provided that unless South Western accepted the provisions of the plan with respect to the sale of its railroad properties to the reorganized Company its lease would be disaffirmed.

(3) The Commission has the power under the Bankruptcy Act to prescribe in its plan of reorganization of the Debtor the conditions upon which the executory contracts of the Debtor (including unexpired leases) may be rejected.

(4) The purpose of the Benton case and the injunction granted by the State Court Judge was to defeat the Reorganization Plan, as it related to South Western.

(5) The Benton case was not strictly a suit in personam; it was directed at the Reorganization Plan which was the Bankruptcy res, on which it proposed to operate through the injunction against South Western.

(6) The res before the Bankruptcy Court is the reorganization proceeding and the claims and controversy relating to and effecting the formulation, acceptance and carrying out the Plan.

(7) The res was not the reversionary interest of South Western in its leased property.

(8) The Bankruptcy Court had prior and exclusive jurisdiction over the matter of the acceptance or rejection of the Reorganization Plan by South Western.

(9) The exclusive jurisdiction of the bankruptcy court in this case rests upon the express provisions of the Bankruptcy Act with respect to the reorganization of railroads, which authorizes a plan of reorganization modifying or altering the rights of creditors generally, or any class of them; rejecting the contracts of the debtor, which are executory in whole or in part, including unexpired leases; and defining "creditors" to include for all purposes of the Act all holders of claims of whatever character against the debtor, "including the holder of a claim under a contract executory in whole or in part, including an unexpired lease."

(10) The exclusive jurisdiction of the Bankruptcy Court rests on the proposition that the acceptance or rejection of the approved plan of reorganization of the debtor by South Western Railroad, and the disaffirmance of its lease in the event it rejected the plan, and the validity of South Western's acceptance, and the consummation of the acceptance, are all within the framework of the plan of reorganization.

(11) The bankruptcy court has prior and exclusive jurisdiction, also, because the railroad property of the South Western is in the possession of the court. South Western is a party to the reorganization proceeding, and the Commission by its plan of reorganization with respect to South Western, has, in the public interest, required South Western to accept the plan under penalty of having its lease disaffirmed.

(12) The powers of the Bankruptcy Court and the powers of the Interstate Commerce Commission are brigaded for the purposes of reorganization. The

jurisdiction of the Commission under Section 5 of the Interstate Commerce Act in the matter of merger or consolidation of carriers or the acquisition of one carrier by another, is exclusive and plenary and the Benton suit and the injunction issued by the State Court in that suit transgress the jurisdiction of the Commission and undertake to prejudge a question which is within the exclusive power of the Commission.

(13) Under Section 5 (11) of the Interstate Commerce Act carriers are relieved from the "restraints, limitations and prohibitions of law, Federal, State or municipal in so far as may be necessary" to enable carriers to carry into effect the acquisition of one carrier by another. The Court of Appeals failed to give effect to this Statute. The Benton suit usurps the power conferred on the Commission.

(14) The Benton case and the injunction of the State Court Judge therein and the decision of the Court of Appeals are contrary to and do not consider (1) the provisions of Sub-section (b) of Section 77 of the Bankruptcy Act which provides that a plan of reorganization "shall provide adequate means for the execution of the plan, which may include the transfer of any interest in or control of all or any part of the property of the Debtor to another Corporation or Corporations, the merger or consolidation of the Debtor with another Corporation or Corporations, etc."; (2) the provisions of subsection (f) of Section 77 of the Bankruptcy Act, which grant authority to carry out the plan under the supervision and control of the judge, "the laws of any State or the decision or order of any State authority to the contrary notwithstanding"; and

(3) the provisions in the plan which give the District Court power to construe it.

(15) The Court of Appeals erred in stating in its opinion "For the Bankruptcy Court to hold that a majority vote of the stockholders of South Western would be sufficient, regardless of State law, would amount to amending the Plan in the face of the Statute which provides that no plan shall be approved or confirmed by the Judge 'unless the plan has been approved by the Commission and certified to the Court' ". The plan was promulgated by the Commission and the Court approved it June 24, 1946, before the Benton suit was commenced (R. 62). The decision of the Bankruptcy Court that South Western had power to convey its property on the vote of a majority of its stock and without unanimous stockholder consent is in no sense an amendment of the plan.

(16) The Court of Appeals erred in holding that the question submitted in the Benton case to the State Court "was peculiarly a question of State law". It would have been if it had been disassociated from the reorganization plan. It was purely a question of Federal law whether in pursuance of the plan the acceptance of South Western was valid and sufficient and was a matter over which the Commission had exclusive jurisdiction.

(17) The observation of the Court of Appeals in the majority opinion that "A solvent corporation * * cannot be constitutionally compelled against its will to convey to the Debtor" is irrelevant. No one is seeking to compel South Western to convey its property against

its will. It has offered to do so by the vote of a large majority of its stock. A small minority of stockholders is trying to prevent the corporation from consummating its wishes, on the theory that a conveyance cannot be made without unanimous stockholder consent.

(18) The observation of the majority opinion of the Court of Appeals that "There is nothing in the plan to indicate that an ultra vires acceptance is authorized or required or that any State law which prohibits acceptance should be disregarded. The plan does not provide that the leased lines may be acquired by a simple majority vote of the stockholders of the Company". Naturally, the plan does not carry any such provisions. The Federal Statutes which have been quoted above confer on the Commission exclusive and plenary power over the acquisition of the property of one carrier by another, and it is presumed that when the plan is to be consummated the Commission will pass on the question whether the acquisition can be effected, and if there is any such obstacle in the State law that it requires unanimous stockholder consent, the Commission has ample power, if it holds that the acquisition is in the public interest, to disregard any such unreasonable obstacle.

(19) Under the provisions of Sections 94-328, 94-329, 94-311 and 94-318 of the Code of Georgia (which are copied in the Appendix No. 2 of this brief) South Western is authorized to sell its property to the reorganized Company with the assent of the majority of its stock.

(20) Under the exigencies which confront South Western it has power under Georgia law to convey its

property on the vote of a majority of its stock, and this question the Bankruptcy Court had the power to decide, all the parties being before the Court; and the Court of Appeals should have affirmed the judgment of the District Court in this respect.

(21) The Court of Appeals erred in holding that a summary proceeding, by ancillary petition in the Bankruptcy Court did not lie to protect its jurisdiction.

ARGUMENT.

(The Plan is copied in 261 I.C.C. Rep. 515 Appendix 3. The applicable provisions of the Interstate Commerce Act and of Section 77 of the Bankruptcy Act are copied in Appendix No. 1; Code Sections 94-328, 94-329, 94-311 and 94-318 of the Georgia Code are copied in Appendix No. 2).

I

South Western is a party to the Plan and a Creditor.

South Western all through the proceedings has litigated the allotment made to it in the Plan. It contested the Segregation Formula and the Severance Studies. It has filed a claim for equipment, which is undetermined; a claim for a declaratory judgment as to its rights if its lease is rejected, which was refused by the Court on the ground that this matter was within the exclusive jurisdiction of the Commission (R. 65).

The offer to South Western is made in the Plan, its acceptance was made in the Plan, and its consummation must be made in pursuance of and within the frame work of the Plan. If there is any question as to whether the acceptance is supported by the necessary corporate authority, that is a question for the Bank-

ruptcy Court and should not be permitted to be litigated in a separate State Court proceeding, to which the Trustee of the Debtor is not a party.

The term "Creditor" is defined in Section 77 (b) of the Bankruptcy Act.

In the Milwaukee case the Terre Haute, a leased line, was held to be a creditor.

Group of Investors v. *Milwaukee R. Co.*, 318 U.S. 523, 549.

See also: *Old Colony Bondholders* v. *N.Y., N.H. & H.R. Co.*, 161 F. (2d) 413, 424.

II

The mechanics of the Plan as it affects South Western.

The Plan makes an offer to South Western for its railroad properties. If it does not accept, its lease is disaffirmed. If the railroads are acquired, it "shall be conveyed to the reorganized Company". Whether the acquisition is to be by purchase, merger or consolidation shall "subject to the approval of the Commission and the Court, be determined by the Trustee or the Reorganization Managers when they begin to function", (R. 63, 64). South Western has accepted the Plan on the vote of a large majority of its stock (R. 67). Under the provisions of sub-Section (f) of Section 77 of the Bankruptcy Act, securities cannot be issued, obligations assumed, property transferred or consolidation or merger effected "until further action by the Commission upon confirmation of the Plan by the Court". This

provision of the Statute is carried forward in the Plan (last provision of the Plan, R. p. 64). The Plan provides that its construction by the Court shall be final and conclusive, (R. 100).

All of this is wholly contrary to and inconsistent with a proceeding in the State Court to hold up the consummation of the Plan as to South Western on the petition of minority stockholders of South Western. If the question could be litigated in any Court, the Bankruptcy Court is the only Court it could be litigated in. Of course, the decision of the State Court that the conveyance could not be made except on unanimous stockholder consent, is equivalent to a denial of the power of the Commission over the matter of sale and consolidations of railroads.

III

The functions of the Commission and the Bankruptcy Court work cooperatively in reorganization under Section 77 of the Bankruptcy Act.

Palmer v. *Massachusetts*, 308 U.S. 79, 87.

Smith v. *Hoboken R.R.*, 328 U.S. 123, 132.

Warren v. *Palmer*, 310 U.S. 132, 137, 138.

IV

The statutory power of the Commission over the merger, consolidation and purchase of one railroad by another, is exclusive and plenary and no court has any power to interfere therewith.

Section 5 (11) of the Interstate Commerce Act provides "The authority conferred by this section shall be exclusive and plenary".

Sub-Section (f) of Section 77 of the Bankruptcy Act as set forth above preserves this exclusive power of the Commission in the consummation of a Plan of Reorganization, and the Plan, itself, as we have said, carries the words of the Statute.

This Court has upheld this exclusive power of the Commission in two recent notable cases, which are decisive of this case:

Smith v. *Hoboken R.R. Co.*, 328 U.S. 123.

Thompson, Trustee, v. *Texas-Mexican Ry. Co.*, 328 U.S. 134.

V

The Commission has full power to authorize a purchase, merger, or consolidation on the vote of a majority of the stock unless a different vote is required under applicable State laws, in which case the number so required shall assent.

Section 5 (11) of the Interstate Commerce Act makes this provision in terms.

The Statute law of Georgia is contained in Code Sections 94-328, 94-329, 94-311 and 94-318 (copied in Appendix No. 2). Under these Statutes all that is required is the vote of a majority of the stock. Code Sections 94-311 and 94-318 do not specify the vote necessary but it has been decided that a majority vote is sufficient.

Dady v. *Georgia & Alabama R. Co.*, 112 Fed. 838.

Code Sections 94-311 and 94-318 are part of the General Railroad Laws of Georgia, under which the

Debtor is incorporated. Power given under these latter Code Sections confers power on both Corporations to consolidate or sell.

Theis v. *Spokane Falls Gas Light Co.*, 49 Wash. 477; 95 Pac. 1074, 1079, 1080.

There is no other applicable State Law on the subject in Georgia.

We think Section 5 (11) is referring to Statute Law, and if there is no different Statutory law in the State, the majority rule of the Federal Statute must prevail.

The Commission would not be bound to follow a decision of the Georgia Court, that unanimous Stockholder consent is necessary, because this would nullify altogether the power of the Commission in the premises. Moreover, this would be wholly inconsistent with the other provisions of Section 5 (11).

VI

Even if it is the law of Georgia that South Western cannot sell its property without unanimous stockholder consent, the Commission and the Court would not be bound by any such law in a reorganization plan under Section 77 of the Bankruptcy Act.

Section 5 (11) of the Interstate Commerce Act provides that a sale, merger, or consolidation under this Act does not require State authority, that the carrier is relieved from the operation of the Anti-Trust Law and all other restraints, limitations and prohibitions of law, Federal, State or municipal, in so far as may be necessary to carry the transaction into effect.

(This Court has held that the above immunity is not limited to matters of the same genus as anti-trust legislation.

New York Central Securities Co. v. *U.S.*, 287 U.S. 12, 26.

Texas v. *U. S.*, 292 U.S. 522, 534).

Sub-Section (b) of the Bankruptcy Act provides that the Plan shall include provisions modifying or altering the rights of creditors generally; and Sub-Section (f) provides that the Judge may require all other proper and necessary parties to make transfers and conveyances, and provides that upon confirmation of the Plan it shall be carried out under the supervision of the Judge, "the laws of any State or the decision or order of any State authority to the contrary notwithstanding".

The following decisions firmly establish the proposition that an incompatible provision of State law cannot stand in the way of the purchase of South Western by the reorganized Company.

Palmer, Trustee, v. *Massachusetts,* 308 U.S., 79, 88.

In re *New York, N.H. & H.R. Co.*, 147 F. (2d) 40.

Texas v. *United States,* 292 U.S. 522, affirming 6 F. Supp. 63.

In re *Missouri Pacific R. Co.*, 39 F. Supp. 436.

Cleveland, C.C. & St. L. Ry. Co. v. *United States,* 275 U.S. 404.

New York Central Securities Co. v. *United States,* 287 U.S. 12, 26, 27.

In re *Pittsburgh Railways Co.*, 155 F. (2d) 477.

Three late decisions of the Commission also hold that in the sale or consolidation of railroads, the Commission has power to disregard limitations and restrictions of State laws under the provisions of Section 5 (11) of the Interstate Commerce Act:

Pere Marquette R. Co. Merger, 267 I.C.C. 207, decided April 1, 1947.

Wheeling and Lake Erie Co. Control, 267 I.C.C.—, decided June 25, 1947.

Southern Pacific Co. Reincorporation, 267 I.C.C.—, decided August 18, 1947.

VII

The provisions of the Interstate Commerce Act and of the Bankruptcy Act supersede conflicting State laws and are not invalid if they operate collaterally to impair contracts.

The theory of Respondents is that South Western Charter is a contract between its Stockholders and as no power to sell is contained in the Charter, that the Code Sections which we have quoted in Point V which confer power to sell on a majority vote, impair the obligation of the contract. The first answer to this is that conferring power to sell on a majority vote does not impair the contract, because the contract was silent on this subject; the second answer is that if these Code Sections are struck down, then there is no Statute law of the State of Georgia and the Federal law, Sec. 5 (11) of the Interstate Commerce Act would be operative, and the third and conclusive answer is that the Federal law on the subject supersedes the State Laws. This is fundamental. The Constitution of the State of Georgia recognizes the supremacy of the Federal law. (Art. XII, Sec. 1, Par. 1).

The Federal law is not invalid, although it may operate collaterally to impair contracts.

Continental Bank & Trust Co. v. *Chicago, R.I. & P. R.R. Co.*, 294 U.S. 648, 680.

Hanover National Bank v. *Moyses*, 186 U.S. 181, 188.

New York v. *United States*, 257 U.S. 591, 592, 600, 601.

In re *New York, N.H. & H.R. Co.*, 54 F. Supp. 595, 623, 624.

VIII

The question of the validity of the conveyance under which South Western is to be acquired by the reorganized Company is a question of Federal law and not a question of State law.

The property is to be acquired under and in pursuance of a plan of reorganization. Both the Bankruptcy Act and the Interstate Commerce Act are involved and the question arises in connection with the carrying out and consummation of the plan.

Burnet v. *Harmel*, 287 U.S. 103.

Morgan, Executor, v. *Commissioner*, 309 U.S. 78.

Deitrick, Receiver, v. *Greaney*, 309 U.S. 190.

D'Oench Duhme & Co. v. *F. D. I. C.*, 315 U.S. 447.

United States v. *Pelzer*, 312 U.S. 399, 402, 408.

Prudence Realization Corporation v. Geist, Trustee, 316 U.S. 89.

Wragg v. *Federal Land Bank*, 317 U.S. 325.

IX

The Bankruptcy Court has prior and exclusive jurisdiction.

The majority opinion of the Court of Appeals grows out of a total misapprehension of the scope and purpose of the Bankruptcy proceedings. As stated by this Court in Continental Bank & Trust Co. v. Rock Island R. Co., 294 U.S. 648, 676, "A proceeding under Section 77 is not an ordinary proceeding in bankruptcy. It is a special proceeding, which seeks only to bring about a reorganization, if a satisfactory plan to that end can be devised. And to prevent the attainment of that object is to defeat the very end, the accomplishment of which was the sole aim of the section and thereby to render its provisions futile."

Judge Hutcheson has pointed out in his dissenting opinion that the res is the "reorganization proceeding, including its controversies and questions, and the plan it was instituted to bring about * * its formulation, acceptance and carrying out".

The Commission has decided that it is in the public interest that the reorganized Company should acquire the railroad properties of South Western, because it is an integral and important part of the system of the Central. The Benton suit is aimed at the prevention of this prime objective of the plan.

The theory of the majority opinion is that the reversionary interest of South Western is the subject matter of the purchase proposed to be made by the reorganized Company, that this interest is not in the possession of the Bankruptcy Court and, therefore, the State Court has jurisdiction over the question whether the South Western has the legal capacity to sell this

interest to the reorganized Company. The thing which the reorganized Company must have is not a mere reversionary interest in the property. The Plan proposes that the reorganized Company shall acquire certain specific lines of railroads. The reorganized Company must not only acquire the so-called reversionary interest, it must acquire the leasehold interest; that is, the fee simple title to this railroad property. It cannot be split up into segments for the purposes of reorganization. The theory of the majority opinion is very attenuated, and unreal, and failed to recognize the central fact, which is, that the State Court case was brought for the sole purpose of preventing the consummation of the Plan as it relates to South Western.

The jurisdiciton of the Bankruptcy Court is exclusive. Section 77 (b) of the Bankruptcy Act.

Continental Bank & Tr. Co. v. *Rock Island R. Co.*, 294 U.S. 648, 675, 676,

Smith v. *Hoboken R. Co.*, 328 U.S. 123, 130.

Thompson, Trustee, v. *Texas-Mexican Ry. Co.*, 328 U.S. 134, 139, 142, 143.

Warren v. *Palmer*, 310 U.S. 132, 137, 138.

Gardner, Trustee, v. *New Jersey*, 329, U.S. 565, 577.

X

The District Court had possession of the property and prior jurisdiction, and, therefore, it had the power to enjoin the parties plaintiff in the Benton Case from proceeding in the State Court.

Section 77 (b) of the Bankruptcy Act.

Kline v. *Burke Construction Co.*, 260, U.S. 226, 231.

Looney v. *Eastern Texas R. Co.*, 247 U.S. 214, 221.

Ex Parte Baldwin, 291 U.S. 610, 615.

XI

A Bankruptcy Court is ordinarily not at liberty to surrender its jurisdiction, and especially so in a case of this kind.

Isaac v. *Hobbs Tie & Timber Co.*, 282 U.S. 734, 739.

United States Fidelity Co. v. *Bray*,
225 U.S. 205, 218.

In re *New York, N.H. & H.R. Co.*,
54 F. Supp. 595, 624.

XII

There is no reason why this matter should be remitted to the State Court to decide.

Meredith v. *Winter Haven*, 320 U.S. 288.

In re *New York, N.H. & H.R. Co.*,
54 Fed. Supp. 595, 624.

Markham, Alien Property Custodian, v. *Allen*,
326 U.S. 490, 495.

Williams v. *Green Bay & W.R. Co.*, 326 U.S. 549.

The principle of "forum non conviens" has no application here and for that reason the two following cases relied on by Respondents are inapplicable.

Thompson, Trustee, v. *Magnolia Petroleum Co.*,
309 U.S. 478.

In re *Central R.R. Co. of New Jersey*,
163 F (2d) 44.

XIII

The State Court, having acted in excess of its jurisdiction, the Bankruptcy Court had power to annul and set aside its decree.

21 *Corpus Juris Secundum*, pp. 177, 178 and cases cited under Note 2.

United States v. *Walker*, 109 U.S. 258, (reviewing many cases on the subject).

XIV

In the exigencies which confront South Western, it clearly has power under Georgia Law to sell its railroad property on the vote of a majority of its stock.

The only Statute Law of Georgia on the subject is Code Sections 94-328, 94-329, 94-311 and 94-318, copied in Appendix 2. Under these sections of the Code the State has consented to the sale so that South Western stands in the same position as to sale of its property as does a private corporation.

The findings of fact by the District Court and the four letters written by the President of South Western to its Stockholders (R. pp. 68 to 72, inc.), show that South Western cannot operate its own property, and that if Central operates for its account, that South Western would in time become insolvent.

The modern authorities are to the effect that when a corporation finds itself in the predicament of South Western that it can sell all its property and liquidate on a majority vote of its Stockholders.

Fletcher Cyc. Corporations, Sections 2946, 2947, 5797.

Morawetz on Private Corp. (2nd Ed.) Section 413.

Plant v. *Macon Oil & Ice Co.*, 103 Ga. 666.

Noyes (2 ed.) *Intercorporate Relations*, Sections 110, 111.

Professor Warren, 30 *Harvard Law Review*, pp. 835, 858.

Geddes v. *Anaconda Copper Mining Co.*, 254 U.S. 590, 595, 597, 598.

Patterson v. *Shattuck Arizona Copper Co.*, 168 Minn. 611, 244 N.W. 281 (Citing many cases and text books).

Calnan v. *Guaranty Security Corp.*, 271 Mass. 531; 171 N.E. 830.

Beidenkopt v. *DesMoines Life Ins. Co.*, 160 Iowa 629; 142 N.W. 434.

Inhabitants of Waldoboro v. *Knoxville & L.R. Co.*, 24 Atl. 942.

Bassett v. *City Bank & Tr. Co.*, 116 Conn. 617; 165 Atl. 557.

The District Court having all the parties before it, could and should have decided this question as it did.

The case of *Alexander* v. *Atlanta & West Point R.R. Co.*, 180 Ga. 151 (relied on by Respondent) holds that this Company which was chartered by a special Act, could not amend its Charter, and adopt all the

provisions of the general railroad law of Georgia, which was a material amendment of its Charter, without unanimous vote of its Stockholders (notice particularly the last paragraph of the decision). This is a very different question from the question in the case at bar, whether South Western in the predicament in which it finds itself, is bound to languish and die for want of unanimous consent of its Stockholders.

XV

Bankruptcy Court has power, in a case like this, to proceed summarily, by Ancillary Petition, and its process runs in all judicial Districts.

On the power of the Court to proceed summarily.

I High on Injunctions, Section 302.

5 Remington on Bankruptcy, Sections 2193.50, 2517.

Continental Bank v. Rock Island Ry., 294 U.S. 648, 681, 682.

Local Loan Co. v. Hunt, 292 U.S. 234, 239, 240.

Murphy v. John Hofman Co., 211 U.S. 562, 569.

Wabash R.R. v. Adelbert College, 208 U.S. 38.

On the point that process runs in all districts.

Continental Bank v. Rock Island Ry., 294 U.S. 648, 681-684.

In re Standard Gas & Electric Co., 189 F. (2d) 149, 153.

In re Standard Gas & Electric Co., 119 F. (2d) 658, 663.

Ex Parte Baldwin, 291 U.S. 610, 615.

Respectfully submitted,

T. M. CUNNINGHAM,
26 Bryan St., East, Savannah, Ga.

A. R. LAWTON, JR.
26 Bryan St., East, Savannah, Ga.

WALTER A. HARRIS,
Persons Building, Macon, Ga.

Attorneys for Merrel P. Callaway, Trustee of the Debtor.

WALLACE MILLER,
Persons Building, Macon, Ga.
Attorney for South Western Railroad Company.

Dated February 12, 1948.

APPENDIX No. 1

Applicable Sections of the Interstate Commerce Act and of the Bankruptcy Act. (Italics ours).

Provisions of the Interstate Commerce Act.

Section 1, Paragraph (18), provides:

"No carrier by railroad *** shall acquire or operate any line of railroad *** unless and until there shall first have been obtained from the Commission, a certificate that the present or future public convenience and necessity require the *** operation *** and no carrier by railroad shall abandon all or any portion of the line of railroad or the operation thereof, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity permit of such abandonment."

Section 1, Paragraph 20, provides:

"The Commission *** may attach to the issuance of the certificate such terms and conditions as in its judgment the public convenience and necessity may require *** Any operation contrary to the provisions of this paragraph may be enjoined by any court of compet t jurisdiction at the suit of *** any party in interest."

Section 5, Paragraph 2 (a), requires approval and authorization of the Interstate Commerce Commission for two or more carriers to consolidate, merge, or for any carrier to purchase, lease or contract to operate the property of another carrier.

Section 5, Paragraph (2) (b) provides:

"If the Commission finds that, subject to such terms and conditions and such modifications as it shall find to be just and reasonable, the proposed transaction is within the scope of subparagraph (a), *and will be consistent with the public interest,* it shall enter an order approving and authorizing such transaction."

Section 5 (4) provides:

"It shall be unlawful for any person, except as provided in paragraph (2), to enter into any transaction within the scope of paragraph (a) thereof."

Section 5, Paragraph 11, provides:

"The authority conferred by this Section *shall be exclusive and plenary,* and any carrier or corporation participating in or resulting from any transaction approved by the Commission thereunder shall have full power (with the assent, in the case of a purchase and sale, a lease, a corporate consolidation or corporate merger, *of a majority unless a different vote is required under applicable State law, in which case the number so required shall assent* of the votes of the holders of the shares entitled to vote of the capital stock of such corporation ***) to carry such transaction into effect and to own and operate any properties and to own and exercise any control or franchises acquired through said transaction *without invoking any approval under State authority,* and any carriers or other corporations, and their officers or employees and any other persons participating in a transaction approved or authorized under the provisions of this section shall be and they are hereby relieved

from the operation of the anti-trust laws and of all other *restraints, limitations and prohibitions of law, Federal, State or municipal in so far as may be necessary,* to enable them to carry into effect the transaction so approved or provided for in accordance with the terms and conditions, if any, imposed by the Commission, and to hold, maintain, and operate any properties and exercise any control or franchise acquired through such transaction. Nothing in this Section shall be construed to create or provide for the creation, directly or indirectly, of a Federal corporation, *but any power granted by this Section to any carrier or other corporation shall be deemed to be in addition to and in modification of its powers under its corporate charter or under the laws of any State".*

Provisions of Sec. 77 of the Bankruptcy Act.

Sub-Section (a) provides:

"If the petition is so approved, the Court in which such order is entered shall, during the pendency of the proceedings under this section and for the purposes thereof, have exclusive jurisdiction of the debtor and its property wherever located, and shall have and may exercise in addition to the powers conferred by this section all the powers, not inconsistent with this section, which a Federal Court would have had if it had appointed a receiver in equity for the property of the debtor for any purpose. Process of the Court shall extend to and be valid when served in any judicial district."

Sub-Section (b) provides:

"A plan of reorganization within the meaning of this Section (1) shall include provisions modifying or altering the rights of creditors gen-

erally or of any class of them, secured or unsecured, either through the issuance of new securities of any class or otherwise *** (5) shall provide adequate means for the execution of the plan *which may include the transfer of any interest in or control of all or any part of the property of the debtor to another corporation or corporations, the merger or consolidation of the debtor with another corporation or corporations **** *the amendment of the charter of the debtor* *** may reject contracts of the debtor which are executory in whole or in part, including unexpired leases; and may include any other appropriate provisions not inconsistent with this Section. The adoption of an executory contract or unexpired lease by the Trustee or Trustees of a debtor shall not preclude the rejection of such a contract or lease in a plan of reorganizaiton approved hereunder, and any claim resulting from such rejection shall not have priority over any other claims against the debtor, because such contract or lease had been previously adopted."

Sub-Section (c) (6) provides:

"If a lease of a line of railroad is rejected, and if the lessee, with the approval of the Judge shall elect no longer to operate the leased line, it shall be the duty of the lessor at the end of a period to be fixed by the Judge to begin the operation of such line, unless the Judge upon the petition of the lessor shall decree after hearing that it would be impracticable and contrary to the public interest for the lessor to operate the said line, in which event it shall be the duty of the lessee to continue operation on or for the account of the lessor until the abandonment of such line is authorized by the Commission in accordance with the provisions of Section 1 of the Interstate Commerce Act as amended."

Sub-Section (f) provides:

"Upon confirmation of the plan, the debtor and any other corporation or corporations organized or to be organized for the purpose of carrying out the plan, shall have full power and authority to, and shall put into effect and carry out the plan and the orders of the Judge relative thereto, under and subject to the supervision and the control of the Judge, the laws of any State or the decision or order of any State authority to the contrary notwithstanding. *** upon confirmation of a plan the Commission shall, without further proceedings, grant authority for the issue of any securities, assumption of obligations, transfer of any property, sale, consolidation or merger of the debtor's property, or pooling of traffic, to the extent contemplated by the plan and not inconsistent with the provisions and purposes of the Interstate Commerce Act as now or hereafter amended."

Sub-Section (f) further provides:

"The Judge may require the trustee or trustees appointed hereunder, the debtor, any mortgagee, the trustee of any obligation of the debtor *and all other proper and necessary parties* to make any such transfer or conveyance and may require the debtor to join in any such transfer or conveyance made by the trustee or the trustees.

Section 2 (15) of the Bankruptcy Act provides that bankruptcy courts may "(15) Make such orders, issue such process, and enter such judgments, in addition to those specifically provided for as may be necessary for the enforcement of the provisions of this act: provided, however, that an injunction to restrain a court may be issued by the Judge only".

APPENDIX No. 2

Applicable Sections of the Code of Georgia of 1933.

94-328. "AUTHORITY TO SELL OR LEASE RAILROAD. Any railroad corporation organized under the laws of this State, which has heretofore leased its property for a long term of years to another corporation, which lease has terminated, and the lessor is not a going concern or equipped to conduct the operations of a railroad company, is hereby authorized to sell or lease its property, rights, and franchises to another railroad corporation upon such terms as may be agreed upon by the board of directors of the selling or lessor corporation and assented to by the holders of a majority of its stock. (Acts 1933, p. 235)."

94-329. "RIGHTS ACQUIRED. The railroad corporation to which a sale or lease is made under the terms of the preceding section shall acquire all the property, rights, and franchises of the selling, or lessor, corporation. (Acts 1933, p. 235)."

The above two Code Sections are codified from the Act of 1933, p. 235.

Code Section 94-311. "Any railroad company incorporated under this Title shall have the power to make contracts with any railroad company which has constructed or shall hereafter construct any railroad within this State or any other State, that will enable said companies to run their roads in connection with each other, and merge their stocks, or to consolidate with any such company within or without this State, or to lease or purchase the property of any other such company and hold,

use, and occupy the same in such manner as they may deem most beneficial to their interests: Provided, that no railroad shall purchase a competing line of railroad, or enter into any contract with a competing line of railroad calculated to defeat or lessen competition in this State; and any violation of this section shall subject the corporation to all the penalties incident to such violation of the law. (Acts 1892, p. 49)."

Code Section 94-318. "Any railroad Company incorporated under the provisions of this title shall have authority to sell, lease, assign or transfer its stock, property and franchises to, or to consolidate the same with those of any other railroad company incorporated under the laws of this or any other state or of the United States, whose railroad within or without the state shall connect with or form a continuous line with the railroad incorporated under the law, upon such terms as may be agreed upon; and conversely any such corporation organized under the provisions of this title may purchase, lease, consolidate with, absorb and merge into itself the stock, property and franchises of any other railroad company incorporated under the laws of this or any other state or the United States, whose railroad within or without this state shall connect with and form a continuous line or system with the railroad of such company incorporated under this title upon such terms as may be agreed upon."

The above two Code Sections are a part of Title 94 of the Code of Georgia of 1933, which contains the law for the incorporation of railroad companies and was passed in 1892 (Acts 1892, pp. 49, 51).

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1947

No. 607

MERREL P. CALLAWAY, as Trustee of the Property of Central of Georgia Railway Company, Debtor, et al.,
Petitioners,

vs.

L. O. BENTON, JR., et al.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO UNITED STATES CIRCUIT COURT OF APPEALS FIFTH CIRCUIT

REPLY BRIEF FOR PETITIONERS

T. M. CUNNINGHAM,

A. R. LAWTON, JR.

WALTER A. HARRIS,
Attorneys for Merrel P. Callaway, Trustee.

WALLACE MILLER,
Attorney for South Western Railroad Company.

Dated: March 13, 1948.

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(The numerals in parenthesis refer to the pages of the Record)

I

Seaboard Air Line Railroad Company v. Daniel, decided by the Supreme Court February 16, 1948, is decisive of this case.

This case is reported in Volume 92, No. 10, U.S. Supreme Court Law Ed. Adv. Op. 409.

This case did not come to our attention until after the printer's proof came to hand, hence it is cited separately and not in its proper order in the brief.

The case decides that the Interstate Commerce Commission has exclusive and plenary jurisdiction over the consolidation or acquisition of railroad carriers; and that, notwithstanding the Constitution and laws of South Carolina, which provide that railroad lines within that State can be owned and operated only by State created corporations, and that a railroad corporation chartered only under the laws of another State is forbidden under heavy penalties to exercise such powers in South Carolina, the Interstate Commerce Commission had power to set aside the Constitution and laws of South Carolina, and to authorize the Seaboard Air Line Railroad Company which was chartered only under the laws of Virginia, to own and operate a railroad line in South Carolina, the Commission having found that compliance with the South Carolina law would not be consistent with the public interest.

The Benton case in the State Court seeks not only to take away from the Interstate Commerce Commission its exclusive and plenary jurisdiction to pass on the aquisition of South Western by the reorganized Central of Georgia, but it seeks to absolutely prohibit the acquisition by an injunction against the Officers and Directors of South Western, on the theory that South Western has no power under its Charter to convey its property. The interlocutory injunction, granted on his own motion, by the State Court Judge, prohibits the acquisition except on the unanimous vote of the stockholders of the South Western, which is equivalent to prohibition.

The decision of the Circuit Court of Appeals in the case at bar is wholly at variance with this decision of the Supreme Court.

II.

The contention of Respondents that the Petition does not comply with Supreme Court Rule 38.

The contention is that Rule 38 (2) requires that the petition shall contain "the questions presented". The petition asks for the writ of certiorari to review and reverse the judgment of the Fifth Circuit Court of Appeals, and the questions presented on which the Petitioners desire a review of the decision and judgment of the Court of Appeals, are set forth specifically in Paragraph 14 of the petition, pages 7 to 13. Of course, the Court, if it wishes, may grant the certiorari and limit its review as it pleases.

Several decisions are cited by Respondents to the effect that the Court will consider only questions specifically brought forward in the petition for certiorari. No one denies this proposition, and for this very reason, Petitioners stated specifically the questions on which they desired a review of the decision of the Fifth Circuit Court of Appeals.

III

The exclusive jurisdiction of the Bankruptcy Court and the Interstate Commerce Commission does not turn on the attenuated theory that the reversionary interest of South Western is not in the possession of the Bankruptcy Court.

(1) The subject matter of the case in the Bankruptcy Court is the reorganization proceeding and all the claims, issues and controversies relating to or affecting the formulation, acceptance and carrying out of the Plan. The offer made to South Western, its ac-

ceptance or rejection thereof, the disaffirmance of the lease, the conveyance which South Western must make to the reorganized Company, are all within the orbit of the jurisdiction of the Bankruptcy Court and the Commission. It is not only a question of possession of property, it is primarily a question of subject matter, of which the Bankruptcy Court had, unquestionably, prior jurisdiction.

(2) The South Western is a party to the Bankruptcy proceeding. The facts on which this statement is rested are contained in the findings of fact by the District Court (65); and on the conclusion of law stated by the District Court that "South Western is a party to the reorganization proceedings and to the Plan for all purposes connected with the Plan." (75).

(3) South Western is a creditor by virtue of the fact that it holds a claim against the Debtor under an unexpired lease (Conclusion of Law of the District Court (75)).

Sub-section (b) of Section 77 of the Bankruptcy Act.

(4) When and if the reorganized Company acquires the railroads of South Western, it will acquire not only the leasehold interest of the Central but also the reversionary interest of South Western. The property in so far as the acquisition of it under the plan is concerned, cannot be split up into two parts, one leasehold interest and the other reversionary interest. The railroad, which is the thing the reorganized Company will acquire, is in the physical possession of the Bankruptcy Court.

IV

Judicial Code Section 265 is not applicable to a case like this.

Respondents argue at length that this Judicial Code Section is applicable to this case. If there is one thing which is definitely settled by the decisions of this Court, it is that this Judicial Code Section is not applicable to a case like this.

Judicial Code Section 265 (28 U.S.C.A. Sec. 379), provides "The writ of injunction shall not be granted by any Court of the United States to stay proceedings in any Court of a State, except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy."

The Statute itself excepts injunctions authorized by any law relating to proceedings in bankruptcy. The Bankruptcy Court is not at liberty to surrender its jurisdiction in a case like this (see cases cited on page 20 of our brief in support of the petition).

A Court of the United States is not prevented from enforcing its own judgments by this Statute.

Dietzsch v. *Huidekoper*, 103 U.S. 494, 497.

"The use of the writ of injunction, by Federal Courts first acquiring jurisdiction *over the parties or the subject matter of a suit*, for the purpose of protecting and preserving that jurisdiction until the object of the suit is accomplished, and complete justice done between the parties, is familiar and long established practice ** Section 265 of the Judicial Code *** has repeatedly

been held not applicable to such an injunction". (Citing many cases).

Looney v. *Eastern Texas R. Co.*, 247 U.S. 214, 221.

"This Section (265) is to be construed in connection with Section 262 which authorizes the United States Courts 'to issue all writs not specially provided for by Statute, which may be necessary for the exercise of their respective jurisdictions, and, agreeable to the usages and principles of law.'*** It is settled that where a Federal Court has first acquired jurisdiction of the subject matter of a cause, it may enjoin the parties from proceeding in a State Court of concurrent jurisdiction, where the effect of the action would be to defeat or impair the jurisdiction of the Federal Court."

Kline v. *Burke Construction Co.*, 260 U.S. 226, 229.

"Having possession, the Court may not only issue all writs necessary to protect its possession from physical interference, but is entitled to determine all questions respecting the same *** The jurisdiction in such cases is exclusive of the jurisdiction of other courts, although otherwise the controversy would be cognizable in them."

Ex Parte Baldwin, 291 U.S. 610, 615.

"The proceeding being ancillary and dependent, the jurisdiction of the Court follows that of the original cause, and may be maintained without regard to the citizenship of the parties or the amount involved and notwithstanding the provisions of Section 265 of the Judicial Code (citing many cases). These principles apply to Bankruptcy proceedings (citing many cases)."

Local Loan Co. v. *Hunt*, 292 U.S. 234, 239, 240.

In *Continental Bank* v. *Rock Island R. Co.*, 294 U.S. 648, the Bankruptcy Court was not in possession of the collateral which the note holders were enjoined from selling. The Court, nevertheless, held that it had power to issue the injunction because the sale of the collateral might adversely affect the reorganization proceedings. Judge Hutcheson in his dissenting opinion in this case quotes especially from the Rock Island case as follows: "A proceeding under Section 77 is not an ordinary proceeding in bankruptcy. It is a special proceeding which seeks only to bring about a reorganization, if a satisfactory plan to that end can be devised. And to prevent the attainment of that object is to defeat the very end the accomplishment of which is the sole aim of the Section, and thereby to render its provisions futile."

V

The Benton case is a flagrant interference with the jurisdiction of the Bankruptcy Court and with the exclusive powers of the Commission.

The Benton case is predicated upon the proposition that South Western has no power, whatever, to sell its property, not even by the unanimous vote of all its stockholders. It sought to stop the Stockholders from voting at all on the question of the acceptance or rejection of the plan of reorganization, and it prayed the Court to enjoin the Officers and Directors of the South Western from "doing or performing any act in behalf of the South Western which might tend to consummate the plan of reorganization of Central of Georgia Railway Company with respect to the acquisition of the properties of the South Western Railroad

Company" (157). After the United States District Court had enjoined the parties in the Benton case from prosecuting that proceeding, the Judge of the State Court, of his own motion, issued his injunction against the Officers and Directors of South Western in the exact language of the prayer of the petition quoted above, with the qualification unless "authorized by a unanimous vote of the stockholders of the defendant Company".

It should be noted that the Trustee of the Debtor was not made a party to this proceeding. He was ignored. This Benton case is an obvious and flagrant attempt to break down the reorganization plan in so far as it concerns the South Western and trespassed on the subject matter of which the Bankruptcy Court and the Commission had exclusive jurisdiction.

VI

The Interstate Commerce Commission has exclusive jurisdiction over the acquisition of the property of one interstate carrier by another interstate carrier.

(The provisions of the Interstate Commerce Act referred to under this heading are contained in Appendix No. 1 of our brief in support of the petition).

(1) Section 5 of the Interstate Commerce Act deals with this subject. According to Section 5 (11) the authority of the Commission is "exclusive and plenary". If there is any law of the State of Georgia which comes into conflict or impairs the power of the Commission in this matter, it is void and of no effect because this Act of Congress has taken exclusive jurisdiction of this subject matter. Section 5 (11) expressly

relieves any person participating in the transaction "from the operation of the Anti-Trust laws and of all other restraints, limitations and prohibitions of law, Federal, State or Municipal, in so far as may be necessary to enable them to carry into effect the transaction". It is further provided in Section 5 (11) that "any power granted by this Section (Section 5) to any carrier or other corporation shall be deemed to be in addition to and in modification of its powers under its corporate charter and under the laws of any State."

(2) The Benton case proposes to run around and ignore this exclusive power of the Commission and to absolutely prevent and prohibit the acquisition of one interstate carrier by another, although the State Court and the State law have absolutely no authority in the premises.

(3) The Benton case is premature, it does not give the Commission any chance to pass on the question of the acquisition. It prejudges this question. The Commission has not yet had a chance to act on it. The last provisions of the Plan (quoted page 64 of the Record) "That nothing herein contained shall be, or be construed as a grant of authority for the issue of any securities, the assumption of obligations, transfers of any property, sale, consolidation or merger of the Debtor's property or pooling of traffic pursuant either to the Bankruptcy Act or the Interstate Commerce Act, until further action by this Commission upon confirmation of the Plan by the Court". The language quoted paraphrases a portion of Sub-section (f) of Section 77 of the Bankruptcy Act (quoted in Appendix No. 1 to our brief in support of the petition). The Commission has not yet acted on the transfer or acqui-

sition of South Western. The Plan has been confirmed by the Court, but the Commission has not yet taken this necessary step.

(4) In the two recent cases of *Smith v. Hoboken R.R. Co.*, 328 U.S. 123, and *Thompson, Trustee,* v. *Texas Mexican Ry. Co.*, 328 U.S. 134, this Court stayed proceedings in the first case in the United States District Court and in the second case in a State Court, because the Interstate Commerce Commission had the primary right under Section 1 (18) of the Interstate Commerce Act to determine the disposition of a leased line and decide whether it should be taken into the reorganization proceedings of the Lessee. These cases are binding authority on the Court of Appeals, on the proposition that the Interstate Commerce Commission has plenary and exclusive jurisdiction to pass on the question of the acquisition of the South Western, and that the proceeding in the State Court in the Benton case was an infringement of the jurisdiction of the Commission.

(5) Even if there were any obstacle in the State law to the acquisition (which we contend there is not), both the Commission and the Court could by-pass it and set it aside if the acquisition was in the public interest. This Court and the Commission has done so on several occasions (see cases cited pages 15 and 16 of our brief in support of the petition).

VII

In putting the Plan in operation the Bankruptcy Court is not subject to the restraint of any State law or decision and hence the jurisdiction of the Bankruptcy Court is exclusive in this matter.

Sub-Section (f) of Section 77 of the Bankruptcy Act provides that the Reorganized Company shall have

full power and authority to put the plan into effect and to carry out the plan and the orders of the Judge relative thereto, "the laws of any State or the decision or order of any State authority to the contrary notwithstanding".

This is a warning to the State authorities to keep their hands off the reorganization plan.

VIII

Section 5 (11) of the Interstate Commerce Act provides that a sale or consolidation or merger may be accomplished by a majority vote unless a different vote is required under applicable State laws.

(1) In this case a majority of the stock of South Western has voted to accept the plan. There is no applicable State law in Georgia which requires any different or greater vote.

(2) Sections 94-328 and 94-329 of the Code of 1933 of Georgia (which are quoted in Appendix No. 2 of our brief in support of the petition), specifically authorize a railroad corporation in the situation of the South Western to sell its property on the vote of a majority of its stock. This Statute was passed for the benefit of the South Western. A Receiver was appointed for the properties of the Central December 1932 (61). These Code Sections were passed in 1933 because the South Western did not have any express authority under its Charter to sell its property, and this law was passed for the relief of South Western.

But Respondents say that South Western has never accepted this law as an amendment of its Charter and it could not accept except by unanimous vote of its

Stockholders, because otherwise their contract would be impaired. By these Code Sections and two others which are hereafter cited, the State of Georgia has given its assent to this quasi public corporation to sell its railroads. The Charter of the South Western does not prohibit the sale of the railroad, it is simply silent on the subject. There is no contract among the Stockholders that the railroad shall never be sold, no matter how necessary it might be to sell it for the protection of the Stockholders and to prevent irreparable loss. The State, by passing the Act of 1933 codified in Code Sections 94-328 and 94-329, did not impair any contract, it simply gave to the stockholders much needed relief. If the South Western cannot sell or lease its property in any event or if it requires unanimous stockholder consent, it is in a bad predicament considering its situation.

IX

Sections 94-311 and 94-318 of the Code of 1933 of Georgia both give the Central and the South Western power to sell or consolidate their properties.

Both of these Code Sections are quoted in Appendix No. 2 of our brief in support of the petition.

These Code Sections are a part of the General Railroad law of the State of Georgia under which the Debtor was incorporated. They permit connecting railroads whether incorporated under the general railroad law or incorporated under any other law to consolidate, merge or sell their railroads to the other. Under these Code Sections the Central can acquire South Western and South Western can sell to Central. These Code Sections in no sense impair the contract between the

stockholders of South Western, and what we have said about Code Sections 94-328 and 94-329 applies equally here. Judge Speer decided in *Dady* v. *Georgia & Alabama R. Co.*, 112 Fed. 838, that although these Statutes did not specify the vote of Stockholders, that a majority vote of the stock was proper corporate action.

X

The case of Alexander v. Atlanta & West Point Railroad Company, 108 Ga. 151, does not militate against our position.

This case is so strongly relied on by Respondents that we wish to point out just what it does decide and what it does not decide. The Atlanta and West Point Railroad Company was chartered under a special Act of the General Assembly before the General Law for the incorporation of railroads was passed. Under the general railroad law a railroad corporation which had been previously chartered was permitted to adopt and make a part of its charter the general railroad law. The Stockholders of the Atlanta and West Point Railroad adopted the general railroad law as a part of its charter, but not by a unanimous stockholder vote, and under the authority of the general railroad law it was attempting to build a belt line railroad around Atlanta, Ga. The Supreme Court had on numerous occasions decided that where a proposed amendment to a charter was fundamental, radical or vital unanimous consent of Stockholders was essential. The Supreme Court decided that the adoption of the general railroad law in its entirety was a fundamental change in the Charter of the Atlanta and West Point Railroad, but the Court expressly declined to decide the question whether the Company could acquire power to construct a belt line without unanimous consent. A reading of the

last paragraph of the decision will show how the Court limited its decision. This is a very different proposition from whether South Western could avail itself of the provisions of Code Sections 94-328, 94-329, 94-311 and 94-318 the use of neither of which would work a fundamental or radical change in its charter such as to impair the contract between the stockholders. As we have pointed out in our brief in support of the petition, pages 21 to 23, a corporation in the predicament in which South Western finds itself, is not bound to languish and die for want of unanimous consent of stockholders. And there is no decision in Georgia which holds that unanimous consent is necessary in the circumstances in which South Western finds itself. The Judge of the State Court did not have before him the facts and circumstances which are in evidence in this case as to the exigencies of South Western, and it is believed that he would not have decided that under these circumstances unanimous stockholder consent was necessary. Obviously, if the Benton case is an invasion of the exclusive jurisdiction of the Bankruptcy Court and the Commission, it is a mere nullity, which no Court has to follow.

XI

The question of the acquisition of South Western is a Federal question and not a question of State laws.

The Federal Statute, Section 5 of the Interstate Commerce Act, governs the question and under paragraph 11 of the Section the jurisdiction of the Commission is exclusive and plenary. But even if it were a question of State law the Federal Bankruptcy Court in the administration of the proceeding had the exclusive right to determine the question, and if the minority

stockholders of South Western wished to raise such a question they should have come into the Bankruptcy proceeding, because the acquisition of South Western was a part of the Bankruptcy proceeding and the Bankruptcy Court had exclusive and prior jurisdiction over the subject matter.

The Federal Courts have power and jurisdiction to decide questions of State law wherever necessary to the rendition of a judgment.

Meredith v. *Winter Haven*, 320 U.S. 228, 234, 237.

In re *New York, N.H. & H.R. Co.*, 54 F. Supp. 595, 624.

Respondents' brief says at page 52 "The Commission in the plan did not authorize a purchase, merger or consolidation on the vote of a majority of the stock or on any other vote. The plan simply authorized the Debtor to acquire the properties of the South Western on the terms stated." Naturally, the plan did not carry any provision on this subject, because Section 5 (11) of the Interstate Commerce Act expressly provides that the acquisition may be had on a majority vote of stock unless a different vote is required under applicable State law.

XII

The United States District Court had the right to pass on the question whether unanimous stockholder consent was necessary in order for the reorganized company to acquire the South Western and the Court concluded that such consent was not necessary under either the Federal statutes or the State law.

All the parties were before the United States District Court. The minority stockholders were challenging the right of acquisition without unanimous stockholder

consent, and as the question bore directly on the subject matter of the reorganization plan as it related to South Western, the United States District Court necessarily passed on that question. It was its right and duty to do so. (See the decision of the United States District Court on this subject, pages 83-89 of the Record). The majority opinion of the Court of Appeals never reached this subject, because it decided that the State Court had the power to decide this question, and that in undertaking to decide it, the jurisdiction of the Bankruptcy Court and the Commission was not infringed.

This Court if it grants certiorari will either pass on this question or decide the case in such a way that it will not be necessary to pass on the question.

XIII

Comments on Respondents' Statement of Facts.

(1) On page 9 of Respondents' brief it is stated "South Western is a prosperous and going corporation, able to achieve the objects of its incorporation". The railroads of South Western have been operated continuously since 1869 by its Lessees (62). It has no operating organization and no equipment or appliances (71). It is in no position to operate its own property (72). It would cost $10,000,000 to buy the necessary equipment (71), and more than $9,000,000 for necessary capital and additions and betterments (71, 72). At normal levels of business the operations of South Western have resulted in large annual losses for many years past (69, 70). It is estimated that if South Western had been operated by Central for account of South Western it would have had an operating deficit, for the year 1946, of $442,754, and for the first three months of 1947, an operating deficit of $201,348 (69).

There are four letters in the record (111 to 128) written by the President of South Western to its stockholders setting forth the reasons why it would be suicidal for the stockholders of South Western not to accept the plan of reorganization. In the exigencies in which South Western finds itself, even though it had no statutory authority to sell its properties, it would have power to do so on the vote of a majority of its stock, and that is the general rule in Georgia and elsewhere as pointed out in our brief, p. 21.

(2) On page 9 of Respondents' brief it is stated the Capital Stock of South Western is 51,191 shares of the par value of $100 per share and that 50,471 shares were outstanding in the hands of the public. This statement is incorrect, in that it states 720 shares are not outstanding in the hands of the public. We presume that it was meant to say that the 1440 shares of South Western owned by Central and pledged by it under its Consolidated Mortgage (60), were not outstanding in the hands of the public, but the 1440 shares are outstanding in the hands of the public notwithstanding Central has an equity in them.

(3) On page 9 of Respondents' brief it is stated that South Western in its Report made to Stockholders March 13, 1947, stated "its road and equipment property are worth $9,523,736.81 and therefore its Common Stock had a book value in excess of $180 per share." The book value is made up of the Capital Stock $5,191,100 plus a write up of $4,247,661.27, which represents additions and betterments put on the property by the Lessees from 1869 to 1913, plus miscellaneous items of $84,975.54 (68).

(4) On pages 9 and 10 of Respondents' brief, it is stated that "In 1942 the Interstate Commerce Commission valued the road and equipment property at $12,830,257. According to this valuation its Common Stock would have a value based on fixed assets alone of approximately $240.00 per share". The District Court in its findings of fact (68) states that the Interstate Commerce Commission's valuation is "cost of reproduction less depreciation", and that "The book value and the Interstate Commerce Commission's valuations were before the Commission and the Court when the allocation of securities was made to South Western under the plan."

The allotment made to South Western under the plan was litigated by South Western. The allotment was approved by the Court and there was no appeal from the judgment of the Court (65, 66). The question is res adjudicata.

(5) On page 18 of our brief in support of the petition we say "The Commission has decided that it is in the public interest that the reorganized Company should acquire the railroad properties of South Western, because it is an integral part of the system of the Central". On page 54 of Respondents' brief it is stated "We respectfully differ with this statement, and assert that the Commission decided no such thing". The acquisition of South Western was an important part of the reorganization plan, otherwise the Commission would not have authorized its acquisition by the reorganized Company. The Commission in the last sentence of its Report on the plan states, "We find that the plan herein approved would be compatible with the public interest" (64). On page 10 of their brief Respondents

state "The South Western comprises some 340 miles of railroad, bridges and depots and appurtenances thereto in the heart of the system of the Central of Georgia Railway *** Without the South Western the Central of Georgia could not operate trains from Florida through Macon and the Northwest. Without the South Western the Central could not operate trains from the coal fields which it touches at Birmingham and vicinity to Savannah and coast. Without the South Western the Central would have no line from Macon to Alabama."

The Commission in its report on the plan stated with reference to South Western (261 I.C.C. Rep. p. 305), "This property is a large and important one comprising no less than 18.25 per cent of system mileage and carrying a comparable proportion of all system traffic".

Respectfully submitted,

T. M. CUNNINGHAM,
26 Bryan St., East, Savannah, Ga.

A. R. LAWTON, JR.,
26 Bryan St., East, Savannah, Ga.

WALTER A. HARRIS,
Persons Building, Macon, Ga.
Attorneys for Merrel P. Callaway, Trustee of the Debtor.

WALLACE MILLER,
Persons Building, Macon, Ga.
Attorney for South Western Railroad Company.

Dated: March 13, 1948.

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October Term 1948

No. 21

MERREL P. CALLAWAY, AS TRUSTEE OF THE PROPERTY OF CENTRAL OF GEORGIA RAILWAY COMPANY, DEBTOR, ET AL., PETITIONERS

Vs.

L. O. BENTON, JR., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF ON BEHALF OF PETITIONERS.

T. M. Cunningham,

A. R. Lawton, Jr.,

Walter A. Harris,
Attorneys for Merrel P. Callaway, Trustee.

Wallace Miller,
Attorney for South Western Railroad Company.

Dated: September 1, 1948.

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Supreme Court of The United States

October Term 1948

No. 21

MERREL P. CALLAWAY, AS TRUSTEE OF THE PROPERTY OF CENTRAL OF GEORGIA RAILWAY COMPANY, DEBTOR, ET AL., PETITIONERS

Vs.

L. O. BENTON, JR., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF ON BEHALF OF PETITIONERS.

I

REFERENCE TO REPORTS OF OPINIONS DELIVERED IN COURTS BELOW.

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L. O. Benton, Jr., et al. v. South Western Railroad Company, et al. (Superior Court of Bibb County, Georgia)—not reported—Opinion and Order R. 20-22.

II

GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED.

This Court has jurisdiction to review the judgment of the Circuit Court of Appeals, Fifth Circuit, in question, under Judicial Code 240, as amended (U.S.C.A. Title 28, Sec. 347); and the Writ of Certiorari has been granted by this Court.

III

STATEMENT OF THE CASE.

This Court has granted the Writ of Certiorari to review the decision of the United States Circuit Court of Appeals rendered January 3, 1948 (R. 183-204), and the judgment entered January 13, 1948, (R. 204) in the case of L. O. Benton, Jr., et al., Appellants v. Merrel P. Callaway, as Trustee, et al., Appellees.

There are no facts in dispute. The facts are contained in the Findings of Fact by the District Court (R. 43-55) and in a Stipulation (R. 71-76).

The Suit of L. O. Benton, Jr., et al.

March 25, 1947, L. O. Benton, Jr., et al., as Stockholders of South Western Railroad Company (hereinafter called "South Western") brought a petition in Equity, in behalf of themselves and others similarly situated who cared to intervene, against South Western, its Officers and Directors in the Superior Court of Bibb County, Georgia, (R. 98-121). The grava-

men of this suit is that South Western has no power under its Charter or any amendment thereof, to transfer its railroad properties. The Charter of South Western and the amendments thereof are silent on this subject. (R.44). A meeting of Stockholders of South Western was to be held March 28, 1947, to consider whether they would assent to the acceptance of the plan of reorganization of Central of Georgia Railway Company (hereinafter called "Central"), which contemplated, as hereinafter more fully set forth, the acquisition by the reorganized Company of the railroad properties of South Western.

The prayers of the Benton petition were (1) that the Officers and Directors of South Western be enjoined from holding the Stockholders' meeting on March 28, 1947, and from submitting to such meeting the proposed Plan to sell the railroad properties of South Western Railroad Company, (2) that if the Stockholders' meeting should be held and that if at that meeting a mere majority of Stockholders should vote in favor of the acceptance of the Plan of Reorganization, that the Officers and Directors of the South Western should be enjoined from carrying the action of the Stockholders into effect, and (3) that they should be "specifically restrained and enjoined from doing and performing any act in behalf of South Western Railroad Company which might tend to consummate the Plan of Reorganization of Central of Georgia Railway Company, with respect to the acquisition of the properties of South Western Railroad Company". (R. 115-116).

The rule to show cause on this petition why an interlocutory injunction should not be granted was ar-

gued before the State Court on March 26th and 27th, 1947. But the interlocutory injunction prayed for was not granted until later, as hereinafter set forth. The Stockholders' meeting was held on March 28, 1947, and the acceptance of the Plan of Reorganization was assented to by them by a large majority, as hereinafter set forth.

The Proceeding Brought by Merrel P. Callaway, as Trustee of the Debtor.

April 18, 1947, Merrel P. Callaway, as Trustee of the property of Central of Georgia Railway Company, brought a summary proceeding in the United States District Court for the Southern District of Georgia, Savannah Division, in which the proceedings for the reorganization of the Railroad were pending, against the parties in the above stated case of L. O. Benton, Jr., et al. This petition alleged that the Bankruptcy Court had exclusive and prior jurisdiction over the subject matter of the suit in the State Court of L. O. Benton, Jr., et al., and that said suit was brought for the purpose of interfering with and preventing the reorganization plan of the Central as it related to South Western, and prayed that the Plaintiffs in the suit might be perpetually enjoined from the further prosecution of their suit in the Superior Court of Bibb County, or any other similar suit elsewhere than in the Bankruptcy proceedings in the United States District Court for the Southern District of Georgia, Savannah Division (R. 1). A temporary restraining order was issued on this petition April 18, 1947, against the Plaintiffs in the Benton suit (R. 7).

The Injunction Granted by the Judge of Bibb Superior Court of his own Motion.

Judge Atkinson, the Judge of the Superior Court of Bibb County, of his own motion, on April 24, 1947, rendered an opinion in the Benton case, in which he held that South Western had no power to sell its property; and issued an order enjoining South Western and its Officers and Directors from conveying the railroads of South Western to the reorganized Central Company, unless "authorized by a unanimous vote of the stockholders of the Defendant Company"; and this injunction order further provided "such officers and directors be and they are hereby restrained and enjoined from doing or performing any act in behalf of the Defendant Railroad Company which might tend to consummate the plan of reorganization of the Central Company, with respect to the acquisition by that Company of the properties of South Western Railroad Company". (R. 173-176). This injunction order was issued out of the Superior Court of Bibb County about 6 days after the United States District Court had restrained the Plaintiffs in the Benton case from proceeding with their case in the State Court (R. 7-9).

Amended Petition of Merrel P. Callaway, Trustee.

After the temporary restraining order was granted by Judge Atkinson of the State Court, Merrel P. Callaway, as Trustee, amended his petition on May 26, 1947 (R. 23) and called to the attention of the Court the fact that the Judge of the State Court had of his own motion on April 24, 1947, granted an interlocutory injunction in the Benton case. This amendment alleged that the interlocutory order of the Judge of the Superior Court of Bibb County was in excess of its jurisdiction

and invaded the exclusive jurisdiction of the United States District Court in the Bankruptcy Proceedings and was an attempt to prevent the South Western from accepting the Plan of Reorganization of the Central.

This amended petition prayed:

(a) That this Court will adjudicate the question whether, under the laws of the State of Georgia under the circumstances of this case, unanimous consent of the stockholders of South Western Railroad Company is a condition precedent to the acceptance of said Plan of Reorganization by South Western Railroad Company, and the consummation of said Plan by the conveyance of its property to the reorganized Company; and that if it is the law of Georgia that unanimous consent of stockholders is necessary in the premises, that this Court as a Court of Bankruptcy, under the powers conferred on it by the Bankruptcy Acts, and under the relevant provisions of the Interstate Commerce Act, both of which Acts are superior to State laws within their respective domains, will declare and decree that under said Acts, in the interest of reorganization and in the interest of the public, that South Western Railroad Company may accept and consummate the said Plan of Reorganization by a conveyance of its property to the reorganized Company, notwithstanding any such law of the State of Georgia, and that any such law is superseded by the provisions of said Federal Acts and is of no force and effect in the premises;

(b) That the order passed April 24, 1947, by the Judge in the suit in the Superior Court of Bibb County may be adjudged to be null and void, and that if and

when the Plan of Reorganization of the Debtor is confirmed, such orders may be passed in the premises as will make effective the acceptance and consummation of said Plan by South Western Railroad Company, its Officers and Directors (R. 24).

The said petition of Merrel P. Callaway having come on to be heard and evidence having been taken, the case was argued by Counsel and the Court thereupon, in conformity with his opinion rendered August 15, 1947, (which is contained in the Record, pp. 34-69), issued a perpetual injunction against the Plaintiffs in the Benton case and against the stockholders who had intervened therein, enjoining them from prosecuting their case, or any other similar case, in the Superior Court of Bibb County, Georgia, or elsewhere than in the Bankruptcy proceeding in the United States District Court. It was further ordered that the injunction granted by the State Court in the Benton case on April 24, 1947, was null and void. (R. 69).

L. O. Benton, Jr., et al., appealed from the above stated final order of the United States District Court to the United States Circuit Court of Appeals, Fifth Circuit, and the judgment of the District Court was reversed by the Court of Appeals and this judgment of reversal is the matter complained of here.

The Reorganization Plan of the Central.

The Reports of the Commission on the Plan are contained in 261 I.C.C. Rep. 203, 501, 627, and the Plan itself is reported 261 I.C.C. Rep. 515, Appendix 3 (R. 73). These reports were put in evidence and it was stipulated may be referred to by either party (R. 73).

The Central is the Debtor in a Reorganization Proceeding of a railroad, pending in the United States District Court for the Southern District of Georgia, Savannah Division, brought under Section 77 of the Bankruptcy Act as amended, and Merrel P. Callaway is the Trustee of the property of the Debtor in this proceeding. In this proceeding a Plan of Reorganization has been proposed by the Interstate Commerce Commission and approved by the Court June 24, 1946, under which South Western is offered $2,200,000 of the First Mortgage 4% Bonds and $1,770,000 of 4½% Income Bonds of the reorganized Company for the railroads and appurtenances of South Western and its real estate (Petition of Callaway, R. 1 and Answer of Benton, R. 11). This allotment was approved by the District Court in its approval of the Plan June 24, 1946, and there was no appeal from this judgment of the Court. (R. 48).

The Plan provides with respect to the Leased Lines of the Debtor (R. 46-47):

> "Prior to or upon consummation of the plan the debtor shall also acquire, if they can be acquired on the terms hereinafter set forth, properties at present leased to the debtor by the South Western Railroad Company, The Augusta and Savannah Railroad, and the Chattahoochee & Gulf Railroad Company; provided, however, that this provision, so far as it concerns the Chattahoochee & Gulf Railroad Company may, in the discretion of the reorganization managers, be disregarded if the reorganized company shall not acquire the railroads of the South Western Railroad Company. If any of these properties shall not be acquired as a result of the acceptance of the plan by the leased-line security

holders, then and in that event the lease or leases of any line or lines not so acquired shall be disaffirmed as of such time at or prior to the consummation of the plan as the court may direct. The method of acquisition, whether through purchase, merger, or consolidation, shall, subject to the approval of the Commission and the court, be determined by the trustee or by the reorganization managers when they begin to function.

"If the leased lines are acquired, the railroads of each of the three and the personal property appurtenant thereto and all of the real estate owned by each lessor shall be conveyed to the reorganized company; each of said lessors shall waive any damages to which it has become or shall become entitled on account of any breach of lease; and the South Western Railroad Company shall waive all claims in respect to equipment. Such conveyances and waivers shall in each instance be on the sole consideration of the delivery to each of the respective lessors of the securities proposed to be allocated to it, as hereinafter specified.

"Securities allocated to the leased lines shall not bear interest or dividends for any period prior to acquisition of the respective leased line."

The last provision of the Plan is as follows (R. 47):

"That nothing herein contained shall be, or be construed as, a grant of authority for the issue of any securities, assumption of obligations, transfer of any property, sale, consolidation, or merger of the debtor's property, or pooling of traffic, pursuant to either the Bankruptcy Act or the Interstate Commerce Act, until further action by this Commission upon confirmation of the plan by the court."

The Commission in the last sentence of its Report on the Plan, states (R. 47) "We find that the plan herein approved would be compatible with the public interest".

The Commission in its Report on the Plan stated "The Plan approved makes provision *** for consolidation, merger or purchase of transportation properties of Lessors in lieu of continued operation under leases, if the leased properties can be acquired on the terms set forth in the plan". (R. 47).

"The construction of the Plan by the Court, whether before or after submission of the Plan to the creditors shall be final and conclusive" (R. 73).

"The carrying out of the Plan shall be as provided in the Bankruptcy Act" (R. 73).

On pages 72 and 73 of the Record appears a quotation by the Commission of the Plan proposed by the Debtor's Trustee, but the last paragraph of the quoted matter is not in the Commission's Plan; nor is the last clause in the first paragraph which reads "in order that it may be accomplished by a method which will be most advantageous to the reorganized Company" in the Commission's Plan.

The capitalization of the reorganized Company is fixed on the theory that the railroad property of South Western will be acquired by the reorganized Company and that the acquisition will relieve the reorganized Company of rental and income taxes aggregating $411,500 per annum. The Plan provides for an issue by

the reorganized Company of $14,000,000 of First Mortgage 4% Bonds and $16,000,000 of Income 4½% Bonds, both issues to be secured by mortgages on the property of the reorganized Company, including the railroads of South Western (R. 50).

South Western and its Relations to the Central.

South Western was incorporated under the laws of Georgia December 27, 1845, (Acts 1845, p. 132). Its railroad mileage is 331 and its railroads lie generally between the Georgia lines and the Alabama lines of the Central system (R. 44). The Commission in its Report on the Plan stated with reference to South Western (261 I.C.C. Rep. p. 305): "This property is a large and important one comprising no less than 18.25 per cent of system mileage and carrying a comparable proportion of all system traffic." The railroads of South Western have been under lease to Central and its predecessor since 1869, and have been operated as a part of the system of the Central and its predecessor (R. 46). The Trustee of the Debtor adopted the lease of South Western for the duration of the Bankruptcy and the railroads of South Western are in the possession of the Trustee and are operated by him (R. 45).

South Western not in Bankruptcy, but is a Party to the Reorganization Proceedings and a Creditor.

South Western is solvent and no Bankruptcy proceedings under Section 77 of the Bankruptcy Act have been instituted against it (R. 48).

South Western appeared specially in the Reorganization Proceedings and asked that its lease be adopted by the reorganized Company without change. All through the proceedings it has litigated the allotment

made to it in the Plan. It contested the Segregation Formula for the separation of earnings between the mortgaged and leased lines of the Debtor. It attacked the Severance Study introduced in evidence on the hearing of the Reorganization Plan. It has filed a claim for equipment which is yet undetermined. It filed a petition for a declaratory judgment as to its rights, in the event its lease was rejected, which petition was refused by the Court on the ground that this was a matter within the exclusive jurisdiction of the Commission (R. 48).

South Western is a "creditor" in the Bankruptcy Proceeding as that term is defined in Section 77 (c) of the Bankruptcy Act, by virtue of its claim for equipment, and as Lessor for its rent, and if its lease is rejected it has a claim for damages.

Acceptance of Plan by South Western and its Stockholders.

February 11, 1947, the Interstate Commerce Commission submitted the Plan of Reorganization of the Central to its creditors and leased lines for their acceptance or rejection on or before midnight March 28, 1947. The Plan was not submitted by the Commission to the stockholders of the South Western, but was submitted to the Corporation itself (R. 48, 49).

March 13, 1947, the Directors of South Western met and resolved that the Plan be accepted subject to the assent to said acceptance by the holders of a majority of South Western stock, as authorized by Section 94-328 of the Code of Georgia (R. 49). The stockholders of South Western met at the adjourned annual meeting held March 28, 1947, and assented to

the acceptance of the Plan, 30,137 shares of the stock being voted in favor of acceptance of the Plan, and 9,057 shares of stock voting against acceptance of the Plan (R. 49). The total Capital Stock of South Western is 51,911 shares (R. 44).

March 28, 1947, South Western, in accordance with the assent of the holders of a majority of the stock of South Western, mailed its ballot to the Interstate Commerce Commission accepting the Plan. After the creditors and leased lines had balloted on the Plan, the result was certified by the Commission to the United States District Court, and after hearing on June 4, 1947, the United States District Court on July 14, 1947, overruled all objections to the Plan and confirmed the Plan, reserving the question in this case for future disposition (R. 49, 50).

THE FINANCIAL POSITION OF SOUTH WESTERN, ITS OPERATING RESULTS, ITS INABILITY TO OPERATE ITS RAILROAD, AND ITS FUTURE PROSPECTS IF SEPARATED FROM CENTRAL.

(1) Financial Position.

The books of South Western show as of December 31, 1946, the book value of the road and equipment $9,523,736.81, which is made up of the Capital Stock $5,191,100, plus a write-up on the books of $4,247,661.27, which represents additions and betterments put on the property by the Lessees from 1869 to 1913, plus miscellaneous items of $84,975.54. The Interstate Commerce Commission's valuation — cost of reproduction, less depreciation; is $12,880,257.00. The book value and the Commission's valuation were both before the Commission and the Court when the allocation of

securities was made to South Western under the Plan. The books of South Western show as of December 31, 1946, total current liabilities of $216,085.22, investment in bonds, $1,096,197.87, and an unappropriated surplus of $5,433,641.31 (which includes the write-up of $4,247,661.27) (R. 50). The present cash position of South Western is derived in part from war earnings for the period June 19, 1940, to June 30, 1943, when South Western was operated by Debtor's Trustee for account of South Western (R. 52).

(2) Its Operating Results.

At normal levels of business the operation of South Western has resulted in large annual losses for many years in the past. During the war years South Western and other parts of the Central and railroads generally had large net earnings. The war years and the war traffic are gone, leaving behind the highest wage scale ever paid railroad employees, the highest prices ever paid by railroads for materials and supplies, and greatly reduced volume of business, both freight and passenger (R. 52). It is estimated that if the South Western had been operated by the Central for account of the South Western, there would have been an operating deficit of $442,754 for the year 1946, and for the first three months of 1947 an operating deficit of $201,348 (R. 51). The large operating losses appear in detail (R. 51).

(3) The Inability of the South Western to Operate its Property.

South Western has been operated under a lease by its Lessees since 1869 (R. 46). It has no operating organization and no equipment or appliances (R. 52). It would cost $10,000,000 to buy the necessary equipment (R. 52), and more than $9,000,000 for necessary capital and additions and betterments (R. 52, 53).

(4) Its Future prospects if Separated from Central.

The District Court in its Findings of Fact (R. 52) stated "A large part of the traffic of South Western is overhead or intermediate and largely competitive. From all of this (referring to the large annual losses for many years past from the operation of South Western), it is apparent that the operation of South Western as an independent line or by Central for account of South Western, is impractical from a financial standpoint". The District Court further found as a fact (R. 53) that "The South Western is in no position to operate its own property, and the probability is that the Central would be required to operate South Western for the account of South Western and the deficits would be charged to South Western and would be a lien on its property and, if history repeats itself, it seems that the deficits and necessary charges would finally exhaust the property".

There are four letters in the record written by the President of South Western to its Stockholders dated March 14, 1947, April 8, 1947, April 11, 1947, and April 17, 1947 (R. 80, 84, 87, 92), setting forth in detail the reasons which impelled the Directors of South Western to recommend to the Stockholders their acceptance of the Plan; their reasons being in substance that the Directors had exhausted all efforts to sell or dispose of the railroads of South Western, that it was impractical for South Western to undertake the operation of its railroad, that if operated by the reorganized Company for the account of South Western that the result would probably be disastrous, and that the risk was not justifiable, and that the Directors had held out to the last moment in the hope that they would

receive a better offer for the property, but the exigencies were such that it would be wise and expedient to accept the plan, otherwise there would be grave and unjustifiable risks (R. 53).

It is alleged in the petition filed in the Superior Court of Bibb County by L. O. Benton, Jr., et al, and admitted by South Western in its answer thereto, that the stockholders of South Western at their annual meetings held March 9, 1944, March 8, 1945, and March 14, 1946, had resolved that the proposed plan to purchase the South Western properties was grossly unfair and inadequate, and that the proposal was rejected. It was also alleged in said petition, and admitted by South Western in its answer, that at a meeting of the Directors of South Western held July 6, 1945, the decision was reached that it was not necessary for the South Western to take any action until the Plan had first been approved by the creditors, and was put up to the South Western for its acceptance or rejection. The Plan, however, contrary to this view of the Directors of South Western, was submitted by the Interstate Commerce Commission contemporaneously to the creditors of the Central and the leased lines. There is nothing in the Plan to indicate that the Plan would not be submitted to the leased lines until it had been approved by the creditors (R. 53, 54).

IV

SPECIFICATION OF ASSIGNED ERRORS INTENDED TO BE URGED.

(The assignments of error are not stated in the exact language, nor in the consecutive order in which the grounds of the Petition for Certiorari are stated,

but are in substance the same and are stated in the order in which they will be argued).

Error is assigned on the decision and judgment of the Circuit Court of Appeals as follows:

1. South Western is an important and integral part of the Central system, and its acquisition by the reorganized Company is an important part of the Plan of Reorganization and has been adjudged by the Commission to be in the public interest.

2. The purpose and effect of the Benton Case is to defeat the Reorganization Plan as it relates to South Western. The Benton case is not, as held by the Court of Appeals, strictly a suit in personam. Its objective was to prevent the disposition of property which is in the possession of the Bankruptcy Court and to destroy an important part of the Bankruptcy Proceeding. This cannot be lawfully done outside of the Bankruptcy Proceeding.

3. The Bankruptcy Court has exclusive and prior jurisdiction of the subject matter of the State Court suit.

4. The Bankruptcy Court has exclusive and prior jurisdiction by reason of its possession of the property of the Lessor which is to be acquired by the reorganized Company.

5. The subject matter over which the Bankruptcy Court has exclusive jurisdiction is the reorganization proceeding and the claims and controversies relating to

and affecting the formulation, acceptance and carrying out of the Plan; of which the acquisition of South Western is a part.

6. The holding of the Court of Appeals that the reversionary interest of South Western in its leased property was in the possession of South Western and not in the possession of the Bankruptcy Court, and that the reversionary interest was the thing which was to be acquired by the reorganized Company, and therefore the Bankruptcy Court had no jurisdiction over the disposition of this reversionary interest is erroneous on three separate grounds:

(a) The reorganized Company is seeking to acquire the railroads of South Western which are in the possession of the Court; not only the reversionary interest of the Lessor, but the leasehold interest of the Central; and it is not permissible to carve up these two interests and treat them separately; (b) This view of the Court of Appeals involves a total misconception of the scope of a reorganization plan and the function of the Bankruptcy Court; (c) The acquisition of railroad property is a matter within the exclusive and plenary jurisdiction of the Interstate Commerce Commission and is wholly beyond the jurisdiction of the State Court in the Benton suit.

7. The exclusive jurisdiction of the bankruptcy court in this case rests upon the express provisions of the Bankruptcy Act with respect to the reorganization of railroads, which authorizes a plan of reorganization modifying or altering the rights of creditors generally or any class of them; rejecting the contracts of the

debtor, which are executory in whole or in part, including unexpired leases; and defining "creditors" to include for all purposes of the Act all holders of claims of whatever character against the debtor "including the holder of a claim under a contract executory in whole or in part, including an unexpired lease."

8. The exclusive jurisdiction of the Bankruptcy Court and the Commission rest on the proposition that the acceptance or rejection of the plan of reorganization of the Debtor by South Western and the disaffirmance of its lease in the event it rejects the plan, the waiver of damages for the breach of the lease and the waiver of its claims for equipment, and the validity of the South Western's acceptance and the consummation of the acceptance are all within the frame work of the plan of reorganization.

9. The Court of Appeals erred in holding that a summary proceeding, by ancillary petition in the Bankruptcy Court did not lie to protect its jurisdiction.

10. The powers of the Bankruptcy Court and the powers of the Interstate Commerce Commission are brigaded for the purposes of reorganization. The jurisdiction of the Commission under Section 5 of the Interstate Commerce Act in the matter of merger or consolidation of carriers or the aqcuisition of one carrier by another, is exclusive and plenary and the Benton suit and the injunction issued by the State Court in that suit transgress the jurisdiction of the Commission and undertake to prejudge a question which is within the exclusive power of the Commission; and the Bankruptcy Court had power to enjoin the State Court proceeding on this ground.

11. Section 5 (11) of the Interstate Commerce Act prescribes the vote on which one carrier may acquire the property of another, and under this Section carriers are relieved from the "restraints, limitations and prohibitions of law, Federal, State or municipal in so far as may be necessary" to enable carriers to carry into effect the acquisition of one carrier by another. The Court of Appeals failed to give effect to this Statute. The Benton suit usurps the power conferred on the Commission.

12. The Benton case and the injunction of the State Court Judge therein and the decision of the Court of Appeals are contrary to and do not consider (1) the provisions of Sub-section (b) of Section 77 of the Bankruptcy Act which provides that a plan of reorganization "shall provide adequate means for the execution of the plan, which may include the transfer of any interest in or control of all or any part of the property of the Debtor to another Corporation or Corporations, the merger or consolidation of the Debtor with another Corporation or Corporations, ***"; (2) the provisions of sub-section (f) of Section 77 of the Bankruptcy Act, which grant authority to carry out the plan under the supervision and control of the judge, "the laws of any State or the decision or order of any State authority to the contrary notwithstanding"; and (3) the provisions in the plan which give the District Court power to construe it and put it into effect.

13. The Court of Appeals erred in stating in its opinion "For the Bankruptcy Court to hold that a majority vote of the stockholders of South Western would be sufficient, regardless of State law, would

amount to amending the Plan in the face of the Statute which provides that no plan shall be approved or confirmed by the Judge 'unless the plan has been approved by the Commission and certified to the Court' ". The plan was promulgated by the Commission and the Court approved it June 24, 1946, before the Benton suit was commenced (R. 46). The decision of the Bankruptcy Court that South Western had power to convey its property on the vote of a majority of its stock and without unanimous stockholder consent is in no sense an amendment of the plan.

14. The Court of Appeals erred in holding that the question submitted in the Benton case to the State Court "was peculiarly a question of State law". It would have been if it had been disassociated from the reorganization plan. It was purely a question of Federal law whether in pursuance of the plan the acceptance of South Western was valid and sufficient and was a matter over which the Commission had exclusive jurisdiction.

15. The observation of the Court of Appeals in the majority opinion that "A solvent corporation *** cannot be constitutionally compelled against its will to convey to the Debtor" is irrelevant. No one is seeking to compel South Western to convey its property against its will. It has offered to do so by the vote of a large majority of its stock. A small minority of stockholders is trying to prevent the corporation from consummating its wishes, on the theory that a conveyance cannot be made without unanimous stockholder consent.

16. The observation of the majority opinion of the Court of Appeals that "There is nothing in the plan

to indicate that an ultra vires acceptance is authorized or required or that any State law which prohibits acceptance should be disregarded. The plan does not provide that the leased lines may be acquired by a simple majority vote of the stockholders of the Company". Naturally, the plan does not carry any such provisions. The Federal Statutes which have been quoted above confer on the Commission exclusive and plenary power over the acquisition of the property of one carrier by another, and it is presumed that when the plan is to be consummated the Commission will pass on the question whether the acquisition can be effected, and if there is any such obstacle in the State law as that it requires unanimous stockholder consent, the Commission has ample power, if it holds that the acquisition is in the public interest, to disregard any such unreasonable obstacle.

17. Under the provisions of Sections 94-328, 94-329, 94-311 and 94-318 of the Code of Georgia (which are copied in the Appendix No. 2 of this brief) South Western is authorized to sell its property to the reorganized Company with the assent of the majority of its stock.

18. Under the exigencies which confront South Western it has power under Georgia law to convey its property on the vote of a majority of its stock, and this question the Bankruptcy Court had the power to decide, all the parties being before the Court; and the Court of Appeals should have affirmed the judgment of the District Court in this respect.

V

THE ARGUMENT

I

SOUTH WESTERN IS AN IMPORTANT AND INTEGRAL PART OF THE CENTRAL SYSTEM, AND ITS ACQUISITION IS AN IMPORTANT PART OF THE PLAN OF REORGANIZATION, AND HAS BEEN ADJUDGED BY THE COMMISSION TO BE IN THE PUBLIC INTEREST.

The lines of South Western have been operated under lease as a part of the Central system since 1869. The lines of South Western lie between and connect the Georgia and Alabama lines of the system. The Commission said (261 I.C.C. Rep. p. 305) with reference to South Western "This property is a large and important one comprising no less than 18.25 per cent of system mileage and carrying a comparable proportion of all system traffic".

The Plan makes an offer to South Western to acquire its property and is not compulsory. Disaffirmance of the lease was to be the last resort. The Plan further provides that if South Western does accept, it shall waive all claims for damages for the breach of its lease and all claims for equipment. The Plan specifically provides "The Debtor shall also acquire, if they can be acquired on the terms hereinafter set forth, properties at present leased to South Western Railroad Company". The Plan further makes provision for first mortgage bonds and income bonds to be secured by mortgages on all the railroad properties to be acquired by the reorganized Company (including South Western's railroads), and South Western's allotment is made from these bonds. A part of the result of the acquisition to

the reorganized Company is that it would relieve the reorganized Company of rental and income taxes aggregating $411,550 per annum.

The Commission obviously thought that the acquisition of South Western by the reorganized Company was in the mutual interest of both the South Western and the reorganized Company, particularly in view of the fact that South Western was in no position to operate its own properties. The Commission said in its Report, 261 I.C.C. Rep. p. 308, "The record does not support a conclusion that severance would be practicable or of advantage to either the lessor or the debtor". The Court of Appeals in its opinion said "The importance to the Debtor of acquiring South Western is indicated by the fact that, if it fails to do so, the provision for the acquisition of the Chattahoochee & Gulf Railroad Company may be disregarded".

The Commission found that the Plan as a whole was in the public interest which necessarily included the acquisition of South Western.

If the leased lines cannot be acquired, nevertheless, the balance of the Plan of Reorganization would be operative. That is implicit in the provision in the Plan that if any of the leased lines cannot be acquired its lease would be cancelled. However, it clearly appears that the Commission thought acquisition was in the public interest and in the interest of the parties and made provision for the carrying out of the Plan on that theory.

II

THE PURPOSE AND EFFECT OF THE BENTON CASE IS TO DEFEAT THE PLAN OF REORGANIZATION AS IT RELATES TO SOUTH WESTERN.

According to the petition in the Benton case, there can be no sale or lease or consolidation of the properties of South Western, even on unanimous stockholder vote, because there is no power conferred by the Charter of South Western. But, according to Judge Atkinson's injunction, such disposition of the South Western's railroads would require unanimous stockholder consent. In either event it would be impossible to dispose of South Western. The prayers of the Benton petition and Judge Atkinson's injunction are aimed at making it impossible for South Western to accept the reorganization plan and in terms the injunction order prohibits the carrying out of the plan as it relates to South Western without unanimous stockholder consent.

If the complainants in the Benton case should get a decree that South Western could not dispose of its property without unanimous stockholder consent, they would then be in a position from which they could not extricate themselves or the Company, and the result would be that they would win their case, but would in all likelihood lose their property. South Western was authorized by its Stockholders at an annual meeting in March 1945 to sell or lease its property on more advantageous terms than those offered in the Central's reorganization plan (R. 85), but after diligent efforts, neither a lessee nor a purchaser could be found (R. 86). In the Benton petition reference is made to several meetings of Directors and Stockholders of South West-

ern at which they voted to reject the plan of reorganization. But all of these meetings were held before the Commission submitted the plan to South Western February 11, 1947, for its acceptance or rejection. It was finally accepted March 28, 1947. The four letters written by the President of South Western to its Stockholders shortly after the acceptance of the plan, explain why at the earlier meetings they had voted to reject the plan, the reason being that they were trying to sell or lease the property on more advantageous terms than offered in the plan. Benton has been a stockholder of South Western since 1932 (R. 161) and he must have known about the efforts to sell the South Western property. When these efforts failed and the Directors of South Western recommended the acceptance of the Plan, Benton, et al., tried to torpedo the Plan. If they succeed they will certainly be out on a limb.

The Court of Appeals held that the Benton suit was strictly a suit in personam. While it was a suit in personam in the sense that it was brought against certain persons, the objective of the suit was through the process of injunction to destroy the reorganization plan as it relates to South Western. The fact that the suit was in personam does not excuse it as an invasion of the exclusive jurisdiction of the Bankruptcy Court and the Commission.

III

THE BANKRUPTCY COURT HAS EXCLUSIVE AND PRIOR JURISDICTION OF THE SUBJECT MATTER OF THE STATE COURT SUIT.

The subject matter over which the Bankruptcy Court has exclusive jurisdiction is the reorganization

proceeding and the claims and controversies relating to or affecting the formulation, acceptance and carrying out of the reorganization plan, of which the acquisition of South Western is a part.

The acceptance or rejection of the Plan by South Western, the disaffirmance of the lease if South Western rejects the Plan, the waiver of damages for the breach of the lease, the waiver of the South Western's claim for equipment, the validity of the acceptance of the Plan by South Western, and the consummation of the acceptance of the Plan are all within the frame work of the Plan.

The Court of Appeals seeks to uphold the jurisdiction of the State Court on the theory that the reversionary interest of South Western in its leased property is in the possession of South Western, and that the reversionary interest is the thing which is to be acquired by the reorganized Company and, therefore, the Bankruptcy Court had no jurisdiction over the disposition of this reversionary interest. There are three fallacies in this.

The reorganized Company is seeking not only to acquire the reversionary interest of South Western, but it is seeking to acquire the leasehold interest of the Debtor. The South Western's railroads and appurtenances are the things which the reorganized Company is to acquire. It is not permissible to split up the property into two separate interests and to say that one interest is in the South Western and the other interest is in the Debtor. The Bankruptcy proceeding is concerned with the disposition of the property as a whole.

The Court of Appeals went off on the theory that this was an ordinary bankruptcy proceeding and that the South Western was an adverse claimant of property not in the possession of the Bankruptcy Court, which is a total misconception of the function of a reorganization proceeding, and of the relation of South Western to the Bankruptcy proceednig.

As we shall presently show, the acquisition of the property of a railroad carrier by another railroad carrier is a subject matter wholly beyond the jurisdiction of the State Court and within the exclusive jurisdiction of the Commission.

The Reorganization Court had inherent jurisdiction of this subject matter. The Court and the Commission were trying to perfect and consummate a reorganization plan in which the South Western was involved; therefore, the Reorganization Court necessarily drew to itself the decision of all questions affecting the transmission of the property from the South Western to the reorganized Company.

Section 77 (b) (5) provides the reorganization plan "shall provide adequate means for the execution of the plan, which may include *** the merger or consolidation of the debtor with another corporation *** may reject contracts of the debtor which are executory in whole or in part, including unexpired leases".

Moreover, by Section 2 (15) of the Bankruptcy Act (U.S.C. Title 11, Section 11), Courts of Bankruptcy are invested with such authority in equity as will enable them to exercise original jurisdiction in Bankruptcy

proceedings, including the power to "make such orders, issue such process, and enter such judgments in addition to those specifically provided for as may be necessary for the enforcement of the provisions of this Act". (See Continental Bank v. Rock Island Ry., 294 U.S. p. 676).

The jurisdiction and power of the Bankruptcy Court also rests on Section 262 of the Judicial Code (U.S.C.A. Title 28, Section 377), which authorizes United States Courts "to issue all writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions". (See Continental Bank v. Rock Island Ry., 294 U.S. p. 675).

In the case cited below, certain Banks were in possession as pledgee of certain securities of the Rock Island Railway. The Bankruptcy Court enjoined the sale of the pledged securities on the ground that the sale would interfere with the Reorganization Plan. In the course of the opinion the Court said (p. 676):

> "It may be that in an ordinary bankruptcy proceeding the issue of an injunction in the circumstances here presented would not be sustained. As to that, it is not necessary to express an opinion. But a proceeding under Section 77 is not an ordinary proceeding in bankruptcy. It is a special proceeding which seeks only to bring about a reorganization, if a satisfactory plan to that end can be devised. And to prevent the attainment of that object is to defeat the very end the accomplishment of which was the sole aim of the section, and thereby to render its provisions futile."

The injunction was issued in a summary proceeding just as in this case.

Continental Bank v. Rock Island Ry.,
294 U.S. 648, 675.

This decision is a complete reply to the theory of the Circuit Court of Appeals in the case at bar, that the Bankruptcy Court did not have exclusive jurisdiction because the reversionary interest was in the Lessor. In the Rock Island case the possession of the securities was not in the Bankruptcy Court and the interest which the injunction reached was the interest in the securities of a pledgee and the pledgees were not parties to the Bankruptcy proceeding. In the case at bar, the fact that Benton, et al., Plaintiffs in the State Court suit, were not parties to the Reorganization case, does not prevent the Reorganization Court from reaching them with its injunction process. The majority opinion of the Circuit Court of Appeals completely ignores the Rock Island case, but Judge Hutcheson, of the Circuit Court of Appeals, in his dissenting opinion vigorously emphasizes it.

"It is the exclusive jurisdiction of the reorganization Court which gives it power to preserve the railway as a unit and as a going concern and to prevent it from being divided up and dismembered piecemeal. Only in that way can continuous operation of the road be assured and a plan of reorganization be effected which not only safeguards the interests of various claimants, but is also compatible with the public interest."

Gardner v. New Jersey, 329 U.S. 565, 577.

Christopher Engineering Company was being reorganized under Chapter 10 of the Bankruptcy Act in the United States District Court for the Eastern District of Missouri. Subsequently, on an involuntary petition in bankruptcy filed by its creditors, National Air Craft Corporation, a subsidiary of Christopher Company, was placed in bankruptcy in the District Court for the Southern District of Indiana. An order was entered in the bankruptcy proceeding of National directing that National's property be offered for public sale. On the day before the sale a petition was filed on behalf of National in the reorganization proceedings of Christopher in the Missouri District Court, which issued a decree finding that National was a wholly-owned subsidiary of Christopher, and enjoining the sale of National's property. The sale was, nevertheless, made, approved and confirmed. It was held that the order of the reorganization Court was binding on the Bankruptcy Court and was not there subject to be collaterally attacked, and that it was the duty of the Bankruptcy Court to obey the stay order of the reorganization Court, irrespective of whether the petition for reorganization of the alleged subsidiary had been properly filed, and that since the interested parties had an opportunity in the reorganization proceeding to secure a determination of the question whether a parent-subsidiary relationship existed between the Corporations, the same issue should not be tried collaterally in the bankruptcy proceedings.

Duggan, Trustee, v. *Sansberry, Trustee*,
327 U.S. 499.

The scope and extent of the jurisdiction in reorganization is illustrated in the two following cases, which held that although lease agreements had termi-

nated according to their own terms, the question still remained whether it was in the public interest that the leased property should be used in connection with the reorganization of the lessor.

Smith v. *Hoboken R. Co.*, 328 U.S. 123.

Thompson v. *Texas Mexican R. Co.*, 328 U.S. 134.

If a single stockholder of a leased railroad can hold up the inclusion of the leased line in the reorganization of the Debtor, when the great majority of the stockholders of the lessor have voted to accept the reorganization plan, there is something wrong with the mechanics of reorganization. If the State Court can dictate the conditions on which the plan may be accepted by the lessor, and can say that it cannot be accepted except by unanimous stockholder consent, then the State Court has the power to control and negative or break down the reorganization plan. If through the expedient of a litigation in the State Court between the lessor and its stockholders, the question can be determined as to whether the lessor can accept the plan, then this takes away from the reorganization Court its exclusive jurisdiction over the process of reorganization. The Bankruptcy Court is open and if a minority stockholder wishes to litigate the power of the corporation to accept the plan, he can go into the Bankruptcy Court and be heard. Necessarily, the reorganization Court draws to itself questions of this kind, both because it has exclusive jurisdiction over the subject matter and possession of the property.

IV

THE BANKRUPTCY COURT HAD EXCLUSIVE JURISDICTION BY VIRTUE OF ITS POSSESSION OF THE PROPERTY OF SOUTH WESTERN.

The Bankruptcy Court had physical possession of the railroads and other property of South Western which was to be acquired by the reorganized Company under the terms of the plan.

Counsel for Respondents argued in the Court of Appeals that the Bankruptcy Court was merely in possession of the leasehold interest of the Debtor and the Court of Appeals argues that the reversionary interest of South Western is not in the possession of the Court. The physical properties are in the possession of the Court, and that gives the Bankruptcy Court exclusive jurisdiction over the question of the disposition of the property, regardless of what kind of title the Debtor had. South Western was part of the system of railroads operated by the Debtor. This system of railroads went into the physical possession of the Bankruptcy Court. In the plan of reorganization it was decided that it was in the public interest that the reorganized Company should acquire the South Western if it could, and an offer was made in the plan to South Western. A small minority of South Western Stockholders go into the State Court for the purpose of breaking down the plan, on the theory that South Western has no corporate power to dispose of its properties which are in the possession of the Bankruptcy Court. It is elementary that the possession of the property by the Court gives it exclusive jurisdiction as to the question as to what disposition should be made of the property and that the Bankruptcy Court draws to itself the exclusive

right to determine whether unanimous stockholder consent is necessary before South Western can convey its property in pursuance of the provisions of the plan to the reorganized Company. In the Benton suit, the Bankruptcy Trustee is not made a party to the suit; it is merely a suit between the Corporation and its stockholders, and is predicated on the theory that the Bankruptcy Court has nothing whatever to do with the matter. Manifestly, the question of the power of South Western to dispose of the property which is in the possession of the Bankruptcy Court, and which is an important part of the reorganization plan is a question beyond the power and jurisdiction of the State Court. It is a question beyond the power of the State Court for two reasons; first, because the subject matter of reorganization is exclusively the province of the Bankruptcy Court, and secondly, because the property is in the possession of the Bankruptcy Court.

The Connecticut District Court imposed a lien on the Boston & Providence in favor of the New Haven for a deficit in operations of the former. The New Haven was lessee of the Boston and Providence and was in possession of its property. The lease was rejected by New Haven, but the Court required New Haven to operate Boston and Providence for account of the latter. A Trustee in Bankruptcy had been appointed by the Massachusetts District Court for Boston and Providence. The Court held that the Connecticut Court had power to impose the lien. The Court in the course of the opinion said "It is immaterial what title the Debtors had, whether a lease or a fee. The physical property covered by the lease was in the custody of the Connecticut Court by virtue of the provisions of Sec-

tion 77 (a). By virtue of sub-divisions 77 (c) (10) and 77 (c) (6), it is clear that leaseholds are in some instances to be operated by the lessee's trustees".

Warren v. *Palmer*, 310 U.S. 132, 138,

"Bankruptcy Courts have summary jurisdiction to adjudicate controversies relating to property over which they have actual or constructive possession. And the test of the jurisdiction is not title in but possession by the bankrupt at the time of filing the petition in bankruptcy."

Thompson v. *Magnolia Company*, 309 U.S. 478, 481.

This jurisdiction of the Bankruptcy Court extends to all property in the Debtor's physical possession *** In every case the Bankruptcy Court has power in the first instance to determine whether it has that actual or constructive possession which is essential to its jurisdiction to proceed.

Harris v. *Avery Brundage Co.*, 305 U.S. 160, 163.

V

SOUTH WESTERN IS A PARTY TO THE REORGANIZATION PLAN AND IS A CREDITOR IN THE REORGANIZATION PROCEEDING.

South Western has all through the proceeding contended that its lease should be continued and has litigated the allotment made to it under the plan. It filed a claim for a declaratory judgment as to its rights if its lease was rejected which was refused by the Court.

It is a "creditor" as that term is defined in Section 77 (b). "The term 'Creditors' shall include, for all purposes of this Section, all holders of claims of what-

ever character against the debtor or its property, whether or not such claims would otherwise constitute provable claims under this Act, including the holder of a claim under a contract executory in whole or in part including an unexpired lease."

South Western is a creditor, by virtue of its lease, for rent and if its lease is rejected it is a creditor for damages for the breach of the lease. It has a claim for equipment.

In the Milwaukee case, the Terre Haute was a leased line and the rental was the interest on the Terre Haute bonds. The Court held "The Terre Haute bondholders are 'creditors' of the debtor as defined in Section 77 (b) for they are holders of a claim under an unexpired lease".

Group of Investors v. *Milwaukee R. Co.*
318 U.S. 523, 549-555.

In the New Haven case the Court held that the Boston Terminal Company, the Trustee of its mortgage, and its bondholders were creditors of the New Haven. New Haven was obligated to use the terminal and pay its costs of operation. The plan undertook to modify the cost. The Court said (p. 424): "Although their claim is contingent and unliquidated, we think it plain that they are creditors within the statutory definitions. Indeed, the Appellees do not dispute this, but contend that the claim is not presently provable."

Old Colonoy Bondholders v. *New York, N.H. & H.R. Co.*, 161 F. (2d) 413, 424.

VI

THE PROVISIONS OF SECTION 77 OF THE BANKRUPTCY ACT AND OF THE REORGANIZATION PLAN, WHICH BEAR UPON THE JURISDICTION OF THE BANKRUPTCY COURT OVER THE CONVEYANCE OF THE PROPERTY OF SOUTH WESTERN IN PURSUANCE OF THE PLAN.

Sub-section (a) of Section 77 of the Bankruptcy Act provides: "The Court *** shall during the pendency of the proceedings under this Section and for the purposes thereof have exclusive jurisdiction of the debtor and its property wherever located, and shall have and may exercise in addition to the powers conferred by this Section all the powers not inconsistent with this Section, which a Federal Court would have had if it had appointed a receiver in equity for the property of the debtor for any purpose".

Sub-section (b) (5) of Section 77 of the Bankruptcy Act provides that the plan of reorganization shall provide adequate means for its execution which may include, "the merger or consolidation of the debtor with another corporation or corporations" and the plan may reject unexpired leases.

Sub-section (c) (6) of Section 77 provides, if the lease is rejected and if the lessee elects no longer to operate the leased line the Judge may require the lessor to operate the line for account of the lessee.

Sub-section (f) of Section 77 provides that upon confirmation of the plan the Commission shall grant authority for the "transfer of any property, sale, consolidaiton or merger of the debtor's property *** to the extent contemplated by the plan *** and the Judge

may require *** all other proper and necessary parties to make such transfer or conveyance".

Sub-section (f) of Section 77 further provides that upon confirmation of the plan the debtor and the corporation organized for the purpose of carrying out the plan shall put into effect and carry out the plan and order of the Judge relative thereto, "under and subject to the supervision and control of the Judge, *the laws of any State or the decision or order of any state authority to the contrary notwithstanding.*" (Italics ours).

The plan of reorganization provides (a) that the Debtor shall acquire the properties leased to the debtor by South Western, if they can be acquired on the terms stated in the plan; (b) that if the properties cannot be so acquired the lease shall be disaffirmed; (c) that the method of acquisition whether through purchase, merger or consolidation shall subject to the approval of the Commission and the Court, be determined by the Trustee or the reorganization mangers when they begin to function; (d) that if the leased lines are acquired they shall be conveyed to the reorganized Company; (e) that nothing in the plan shall be construed as a grant of authority for the issuance of securities, transfer of property or merger or consolidation until further action by the Commission upon confirmation of the plan by the Court; (f) that the carrying out of the plan shall be as provided by the Bankruptcy Act. The provision in sub-paragraph (e) above, paraphrases the provisions of Sub-section (f) of the Bankruptcy Act.

In view of these explicit provisions of the Bankruptcy Act and the plan, there can be no doubt about

the fact that the State Court in the Benton case ran headlong into the exclusive jurisdiction of the Bankruptcy Courts.

If there should be any such law or decision in the State of Georgia that South Western cannot convey its property without unanimous consent of its stockholders, we apprehend that the Bankruptcy Court would find no difficulty in setting aside any such law, as it has the explicit power to do under the provision in sub-section (f) of the Bankruptcy Act (quoted above).

VII

THE DISTRICT COURT HAVING POSSESSION OF THE PROPERTY AND EXCLUSIVE JURISDICTION OF THE SUBJECT MATTER, HAD POWER TO ENJOIN THE PARTIES IN THE BENTON CASE FROM PROCEEDING IN THE STATE COURT; AND JUDICIAL CODE SECTION 265 IS INAPPLICABLE.

In the Rock Island case this Court demonstrated the power of the Bankruptcy Court to protect by injunction its jurisdiction in reorganization (see especially pp. 675, and 676), and the Court concluded this Section of its opinion with the statement "The Bankruptcy Court, in granting the injunction, was well within its power, either as a virtual Court of Equity, or under the broad provisions of Section 2 (15) of the Bankruptcy Act or of Section 262 of the Judicial Code". It should also be remembered in this connection that the injunction in this case was directed against parties who were not in the Bankruptcy Court and who had possession of the property which was the subject matter of the injunction suit.

Continental Bank v. *Rock Island Ry. Co.*, 294 U.S. 648, 675-676.

Out of numerous cases on the subject of the power of the District Court to protect its jurisdiction by enjoining proceedings in the Sate Court, we have selected:

Kline v. *Burk Construction Co.*, 260 U.S. 226, 231.

Looney v. *Eastern Tex. R. Co.*, 247 U.S. 214, 221.

Ex Parte Baldwin, 291 U.S. 610, 615.

The Respondents argued at length in their brief before the Court of Appeals and in their brief on the petition for certiorari that Judicial Code Section 265 is applicable to a case like this. If there is one thing which is definitely settled by the decisions of this Court, it is that this Judicial Code Section is not applicable to a case like this.

Judicial Code Section 265 (28 U.S.C.A. Section 379) provides: "The writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a State, except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy".

The Statute itself excepts injunctions authorized by any law relating to proceedings in bankruptcy.

A Court of the United States is not prevented from enforcing its own judgments by this Statute.

Dietzsch v. *Huidekoper*, 103 U.S. 494, 497.

"The use of the writ of injunction, by federal courts first acquiring jurisdiction over the parties

or the subject matter of a suit, for the purpose of protecting and preserving that jurisdiction until the object of the suit is accomplished and complete justice done between the parties, is familiar and long established practice." *** Section 265 of the Judicial Code *** has repeatedly been held not applicable to such an injunction." (Citing many cases).

Looney v. *Eastern Tex. R. Co.*, 247 U.S. 214, 221.

"This Section (265) is to be construed in connection with Section 262 which authorizes the United States Courts 'to issue all writs not specifically provided for by Statute, which may be necessary for the exercise of their respective jurisdictions, and, agreeable to the usages and principles of law'. *** It is settled that where a federal court has first acquired jurisdiction of the subject matter of a case, it may enjoin the parties from proceeding in a State Court of concurrent jurisdiction, where the effect of the action would be to defeat or impair the jurisdiction of the federal court."

Kline v. *Burke Construction Co.*, 260 U.S. 226, 229.

"The proceeding being ancillary and dependent, the jurisdiction of the court follows that of the original cause, and may be maintained without regard to the citizenship of the parties or the amount involved, and notwithstanding the provisions of Section 265 of the Judicial Code. (Citing many cases). These principles apply to proceedings in bankruptcy. (Citing many cases)."

Local Loan Co. v. *Hunt*, 292 U.S. 234, 239,240.

VIII

THE BANKRUPTCY COURT HAS THE POWER TO PROCEED SUMMARILY BY ANCILLARY PETITION IN ALL MATTERS AS TO WHICH IT HAS JURISDICTION AND NEED NOT PROCEED BY FORMAL PLENARY PROCEEDINGS.

In the Rock Island case the Court held that the injunction may be granted in a summary proceeding.

Continental Bank v. *Rock Island Ry.*, 294 U.S. 648, 681, 682.

See also:

Local Loan Company v. *Hunt*, 292 U.S. 234, 239, 240.

Murphy v. *John Hofman Co.*, 211 U.S. 562, 569.

Wabash Railroad v. *Adelbert College*, 208 U.S. 38.

1 High on Injunctions, Section 302.

5 Remington on Bankruptcy, Sections 2193.50, 2517.

IX

THE FUNCTION OF THE COMMISSION AND THE BANKRUPTCY COURT WORK COOPERATIVELY IN REORGANIZATION.

Palmer v. *Massachusetts*, 308 U.S. 79, 87.

Warren v. *Palmer*, 310 U.S. 132, 137, 138.

Smith v. *Hoboken R.R.*, 328 U.S. 123, 132.

X

THE COMMISSION HAS EXCLUSIVE AND PLENARY POWER OVER THE SUBJECT OF THE MERGER, OR CONSOLIDATION OF RAILROADS OR THE PURCHASE OF ONE RAILROAD BY ANOTHER.

Section 5 of the Interstate Commerce Act confers power on the Interstate Commerce Commission in the matter of the consolidation or merger of rail carriers and the purchase of the property of one rail carrier by another rail carrier, and Section 5 (2) prescribes the procedure therefor. Under Section 5 (4) it is unlawful for any person to enter into any such transaction without the authority of the Commission. Section 5 (11) provides "The authority conferred by this Section shall be *exclusive and plenary*", and that any corporation participating in such transaction shall have full power to carry such transaction into effect "with the assent *** of a majority, unless a different vote is required under applicable State law, in which case the number so required shall assent, of the votes of the holders of the shares entitled to vote of the capital stock of such corporation, *** *without invoking any approval under State authority*" and that any corporation or their officers or employees participating in such transaction "*shall be and they are hereby relieved from the operation of the anti-trust laws and of all other restraints, limitations and prohibitions of law, Federal, State or municipal as may be necessary to enable them to carry into effect the transaction so approved* *** any power granted by this Section to any carrier or other corporation *shall be deemed to be in addition to and in modification of its powers under its corporate Charter or under the laws of any State*". (Italics ours).

This Court has held with respect to the above provision which relieves carriers from the operation of "the anti-trust laws and all other restraints, limitations and prohibitions of law, Federal, State or Municipal", that the scope of this immunity is not limited to laws of the same genus as anti-trust legislation.

New York Central Securities Co. v. *U. S.*, 287 U.S. 12, 26.

Texas v. *U.S.*, 292 U.S. 522, 534.

The phrase in Section 5 (11) above, "unless a different vote is required by State law", should not be stretched so as to include a law which required a unanimous vote. Such a construction would render the Statute unworkable. The phrase naturally means more or less than a majority. We have never heard of a law which required a unanimous stockholder vote for corporate action. The contention in the Benton suit is that a conveyance by South Western is ultra vires. The State Court Judge held that the conveyance could not be made except by unanimous consent of stockholders.

The phrase "applicable State law" means Statute law.

The Court of Appeals in its majority opinion stated "There is nothing in the plan to indicate that an ultra vires acceptance is authorized or required or that any State law which prohibits acceptance should be disregarded. The plan does not provide that the leased lines may be acquired by a simple majority vote of the stockholders of the Company". Naturally, the plan does not contain any statements of this kind. The Federal Stat-

utes which we have quoted above explicity provide for acquisition on a majority vote unless a different vote is required under State law, and relieves the carrier from any restraints, limitations and prohibitions of State law.

XI

SECTIONS 94-328, 94-329 AND 94-311, 94-318 CONFER POWER ON SOUTH WESTERN TO CONVEY ITS PROPERTIES BY A MAJORITY VOTE OF STOCK.

These Code Sections are copied in Appendix No. 2. They are not amendments of the Charter of South Western. They are general laws which are applicable to South Western; none of them mention South Western by name.

Code Sections 94-328 and 94-329 are codifications of an Act passed March 10, 1933. The Legislature evidently had in mind South Western and other leased lines of Central because the properties of Central, including its leased lines went into the hands of receivers December 19, 1932, (R. 61), and this law was intended to help them in the exigencies which then confronted them.

South Western fills all of the conditions of Code Section 94-928. It was a railroad organized under the laws of Georgia. Its property had been leased for a long term of years to another corporation. The lease under the provisions of the plan is terminated if the plan is not accepted by South Western, and it becomes likewise terminated if South Western accepts the plan and conveys its property. It is not a going concern.

(In a litigation between South Western and the United States in the Middle District of Georgia (R. 129-133) it was decided that South Western was not carrying on or doing business and was therefore not liable for the Federal Capital Stock Tax). South Western is not equipped to conduct the operations of a railroad company.

The State of Georgia by this Statute (as well as by Code Sections 94-311 and 94-318) has consented to the sale or consolidation or merger of South Western. The sale is not ultra vires so far as the State of Georgia is concerned.

Respondents contend that these Code Sections violate the obligations of the contract between the corporation and its stockholders, or between the stockholders themselves. The Charter of South Western is simply silent on this subject of sale of the railroad. No contract can possibly be spelled out from the Charter that the railroad could never under any conditions be sold. The Charter is perpetual. The exigencies pointed out by Code Section 94-328 have arisen. The great weight of modern authority (as we have pointed out in a subsequent section of this brief) is to the effect that a corporation in the situation of South Western can sell its property on the vote of a majority of its stock. The State having granted its consent, the corporation although a quasi-public corporation, is on the same plane as to sale of its property as a private corporation.

As we have said, these Statutes do not purport to be and are not amendments of South Western's Char-

ter. Section 94-328 rescues South Western and its stockholders from a difficult position; it does not in a constitutional sense violate the obligations of the Charter. It cannot be regarded as a fundamental radical or vital change in the Charter, such as the minority stockholders would have the right to enjoin, because it does not impair their vested rights. It would be most unfortunate for the stockholders if they could never sell or lease their property without unanimous consent, because it would be practically impossible to secure such consent.

Code Sections 94-311 and 94-318 are codified from the General Railroad Law of Georgia passed in 1892, under which Central of Georgia Railway Company was incorporated (R. 61).

Power given to one corporation to consolidate with another, or to purchase the property of another, necessarily confers power on both corporations.

Theis v. *Spokane Falls Gas Light Co.*, 49 Wash. 477, (95 Pac. 1074, 1079, 1080).

Under the general railroad law of Georgia, proper corporate action for the purposes of sale, merger or consolidation, is a majority vote of the stock of the corporation.

Dady v. *Georgia & Alabama R. Co.*, 112 Fed. 838.

The transfer of the property of South Western will be carried out under an order of the Interstate Commerce Commission in pursuance of the powers conferred on it by the Interstate Commerce Act and Section 77 of the Bankruptcy Act, and it would make no

difference whether the Code Sections quoted above were unconstitutional, because in that event there would be no statute law in Georgia on the subject of what vote should be required, and even if the Constitution and laws of Georgia should prohibit the sale of South Western property, the Commission could and would set them aside as it has the undoubted right to do.

XII

THE INTERSTATE COMMERCE COMMISSION HAVING EXCLUSIVE AND PLENARY JURISDICTION UNDER SECTION 5 OF THE INTERSTATE COMMERCE ACT OF THE ACQUISITION OF SOUTH WESTERN, THE REORGANIZATION COURT CLEARLY HAD POWER TO ENJOIN THE PROCEEDINGS IN THE BENTON CASE IN THE STATE COURT.

The Commission in its plan of reorganization has made provision for the acquisition of South Western by the reorganized Company. As we have pointed out heretofore, sub-section (f) of Section 77 of the Bankruptcy Act provides that upon confirmation of the plan the Commission shall grant authority for the transfer of any property, consolidation or merger of the debtor's property to the extent contemplated by the plan. The last provision of the plan paraphrases this provision of sub-section (f) of Section 77. The Commission and the Court work cooperatively toward reorganization. The Benton case in the State Court, ignoring the exclusive and plenary jurisdiction of the Interstate Commerce Commission and of the Bankruptcy Court, undertakes to decide for itself that the reorganized Company cannot acquire the South Western under the plan. This is clearly an unwarranted assumption of jurisdiction by the State Court in a matter which is wholly outside of and beyond its jurisdiction.

The two following cases lately decided by this Court are decisive of this question. They were not referred to or cited by the majority opinion of the Court of Appeals. They were simply ignored although they were vigorously pressed on the attention of the Court.

A railroad lease contained a forfeiture clause and the Lessor elected to forfeit the lease. The District Court of the United States in which the Lessee was being reorganized, granted the motion of the Lessor to terminate the lease. The Supreme Court held that the Bankruptcy Court should have awaited the action of the Interstate Commerce Commission on this subject, because under the provisions of Section 77 of the Bankruptcy Act, the Commission had the prior right to determine whether in the interest of reorganization the leased line should continue to be operated by the Lessee or should revert to the system of the Lessor. The Court held that the point was that if the reorganization Court decrees a forfeiture in advance of consideration of the question by the Commission, it interferes with the functions entrusted to the Commission by Section 77. The Court therefore decided that the District Court should stay its hand pending a decision by the Commission on the question.

Smith, Trustee, v. *Hoboken R. Co.* 328 U.S. 123.

The Brownsville Railroad was operating certain tracks owned by the Texas Mexican Railway Company under a trackage agreement. The Texas Railway gave notice of the termination of the agreement as it had the right to do under the terms of the agreement. The Brownsville Company was in Bankruptcy under Section 77. The Texas Company brought suit in a State Court to enjoin the Brownsville Company

from using the tracks and to recover damages for their use. The State Court tried the case on its merits and awarded damages to the Texas Company. The State Court denied the injunction. The Supreme Court first held that in so far as the suit involved a money claim, that the State Court has jurisdiction under Section 66 of the Judicial Code. The Supreme Court then held (p. 142) "Prior to the rendition of the judgment on the merits, the decision of the Interstate Commerce Commission was necessary on two phases of the controversy — one under Section 77 of the Bankruptcy Act, the other under the provisions of the Interstate Commerce Act *** The Commission has the primary responsibility for formulating plans of reorganization under Section 77". The Supreme Court then pointed out that the problem was akin to that involved in the Rock Island case (294 U.S. 648). The Supreme Court also pointed out that the Commission had further powers of an exclusive nature under Section 1 (18) of the Interstate Commerce Act which relates to abandonments. The judgment of the State Court was stayed pending the conclusion of appropriate administrative proceedings.

Thompson, Trustee, v. *Texas Mexican Ry. Co.*, 328 U.S. 134.

XIII

EVEN IF THERE IS ANY STATE LAW WHICH INTERFERES WITH THE ACQUISITION OF SOUTH WESTERN, THE INTERSTATE COMMERCE COMMISSION CAN SET IT ASIDE IN THE PUBLIC INTEREST.

The power of the Commission in this respect has frequently been asserted by the Commission and sustained by the Courts.

This case was decided by the Supreme Court February 16, 1948, shortly before certiorari was granted in the case at bar. Under the Constitution and laws of the State of South Carolina, a railroad can be owned and operated only by corporations created by that State. Seaboard Air Line Railway Company was reorganized in a Court of Equity. The Interstate Commerce Commission authorized, in the public interest, that the reorganized Seaboard Company (which was not created under the laws of South Carolina) might acquire and operate a railroad in South Carolina. The order of the Commission was upheld by the Supreme Court on the theory that the Commission had exclusive and plenary power over the acquisition and having decided that the acquisition was in the public interest, the Constitution and laws of South Carolina could be set aside.

Seaboard Air Line R.R. Co., v. *Daniel*, 333 U.S. 118.

To the same effect see:

Schwabacher v. *U. S. et al.*, 334 U.S. 182.

In re Chicago, R. I. & P. R. Co., 168 F (2d) 587.

The question in this case involved the power of the Commission to require a railroad to make switch connections with a private sidetrack built by a shipper. Under Section 1, paragraph 22, of the Interstate Commerce Act the Commission has jurisdiction over the abandonment or construction of switching or sidetracks. The Supreme Court held "Neither the Legislature nor the Courts of a State can limit the power of the Interstate Commerce Commission to compel connections with private sidetracks".

Cleveland, C.C. & St. L. Ry. Co. v. *United States*, 275 U.S. 404.

This case involved the lease by the New York Central of the Big Four and Michigan Central Companies, which were competitors of the New York Central. The laws of the States of incorporation of these railroads against leasing competing lines, and especially the laws of Ohio, were invoked. The Commission nevertheless authorized the leases. The Supreme Court upheld the power of the Commission and refused to set aside the order of the Commission.

New York Central Securities Co. v. *United States*, 287 U.S. 12, 26, 27.

"The Interstate Commerce Commission has power to authorize a lease of one interstate railway to another permitting the lessee to abandon or remove general offices and shops of the lessor, the maintenance of which as found by the Commission would entail unnecessary and wasteful expenditures, even though such abandonment or removal be forbidden by law of the State of the Lessor's incorporation in which such offices and shops are located" (h.n. 4). On page 531 the Court says "Even explicit charter provisions must yield to the paramount regulatory power of Congress. New York v. United States, 257 U.S. 591, 601."

Texas, et al. v. *United States*, 292 U.S. 522.

The reorganization plan of the Missouri Pacific Railway Company provided for the consolidation of a subsidiary Texas Railroad Company with the reorganized Company and removed the restriction in the Texas laws requiring a Texas railroad company to keep its head office in Texas, and the plan further provided that the head office of the reorganized consolidation should be in St. Louis, Mo. The District Court on the au-

thority of Texas v. United States, 292 U.S. 522, approved the reorganization plan and said (p. 448) "Inconsistent State laws must give way to consolidations effected under authority of the commerce or bankruptcy powers of the Federal Constitution".

In re *Missouri Pacific R. Co.*, 39 F. Supp. 436.

This case involved the question whether the New Haven Railroad Company should apply to the Public Service Commission of Massachusetts for authority to discontinue some 88 passenger stations. This question had nothing to do with the final reorganization. The Supreme Court decided that the Trustee in Bankruptcy was not relieved by Section 77 from making application to the Public Service Commission. The particular part of the decision to which we desire to call attention is the statement on page 88 that the Bankruptcy Court could disregard State law "as part of a complete reorganization for an insolvent road".

Palmer, Trustee, v. *Massachusetts*, 308 U.S. 79.

"State statutes permitting street railways to sell or lease property and franchises to traction companies and permitting operation, as a general system, of different lines which are thus owned, leased or controlled or operated, could not forbid or delimit the jurisdiction of a federal bankruptcy court."

In re *Pittsburgh Railways Company*, 155 F. (2d) 477.

In proceedings in Bankruptcy The New Haven was authorized to purchase the Old Colony, which was leased to New Haven and was authorized to discontinue passenger service on certain portions of Old Colony

if the losses therefrom exceeded certain specified figures during a given period of time. The Commonwealth of Massachusetts objected to this provision as to discontinuing passenger service on the ground that such service could not be discontinued without its authority. The Court held that the provisions of sub-section (f) of Section 77 gave the Bankruptcy Court this power "the laws of any State or the decision or order of any State authority to the contrary notwithstanding" and followed the decision in Palmer, Trustee, v. Massachusetts, 308 U.S. 79. This case also relates to the use by the New Haven of the Boston Terminal Company's property at a reduced rental. The contention was that under the Massachusetts Statute there was a statutory obligation on New Haven and the other users of the terminal to use the terminal and to pay the stipulated rental. As to the Boston Terminal the Court said (pages 51 and 52): "This presents a problem similar to that discussed in the appeal of Massachusetts (referring to the Old Colony matter). For reasons there stated we believe that the Commission can adopt a plan which abrogates State laws that it finds inimical to the public interest in their impingement upon an interstate railroad in reorganization."

In re *New York, N.H. & H.R. Co.*, 147 F. (2d) 40.

In connection with the Boston Terminal case the Court in the above cited case stated "The plan could not and does not amend the charter of the Terminal Company". In making this statement the Court had evidently overlooked the provision in Section 5 (11) of the Interstate Commerce Act which provides "Any power granted by this section to any carrier or other corporation shall be deemed to be in addition to and

in modification of its powers under its corporate charter or under the laws of any State". And the Court also evidently overlooked the provision in the same section of the Interstate Commerce Act which relieves carriers in a matter of this kind from "restraints, limitations and prohibitions of law, Federal, State or Municipal, so far as may be necessary". It was not necessary for the Court or anyone else to amend the Charter of the Boston Terminal Company; the law itself had the effect of amending the Charter, to carry out the provision which the Commission decided was in the public interest, although it might be contrary to the Charter.

The Interstate Commerce Commission has in three late decisions set aside restraints, limitations and prohibitions of State laws.

Pere Marquette Ry. Co. Merger, 267 I.C.C. Rep. 207 246, 247, 248.

Wheeling & Lake Erie Ry. Co. Control, 267 I.C.C. Rep. 401, 415, 416.

Southern Pacific Reincorporation, 267 I.C.C. Rep. 523, 545.

The Court of Appeals in its majority opinion states "For the Bankruptcy Court to hold that a majority vote of the stockholders of South Western would be sufficient, regardless of State law, would amount to amending the plan in the face of the statute which provides that no plan shall be approved or confirmed by the Judge 'unless the plan has been approved by the Commission and certified to the Court' ". The plan was approved by the Commission and certified to the Court

and was approved by it June 24, 1946, before the Benton case was filed. Moreover, the decision of the Bankruptcy Court is misquoted. The Bankruptcy Court merely decided that under the provisions of the Interstate Commerce Act all that was necessary was a majority vote, that the State Statutes required only a majority vote, but even if the State laws required a unanimous vote the Commission under its powers conferred by the Interstate Commerce Act could disregard any such State law and that under the provision of sub-section (f) of Section 77 of the Bankruptcy Act in carrying the plan into effect the Court could disregard any State law or decision contrary to the plan.

XIV

THE PROVISIONS OF THE INTERSTATE COMMERCE ACT AND OF SECTION 77 OF THE BANKRUPTCY ACT ON WHICH WE RELY ARE NOT INVALID IF THEY OPERATE COLLATERALLY TO IMPAIR OR DESTROY THE OBLIGATIONS OF CONTRACTS.

Respondents contend that the Georgia Code Sections to which we have referred are unconstitutional in that they impair the obligation of the contract between the South Western and its stockholders and the stockholders themselves. But the acquisition of South Western will be effected under Section 5 of the Interstate Commerce Act, irrespective of what may be the law of Georgia. The Contract Clause of the Federal Constitution only relates to State action.

"Congress *** undeniably has authority to pass legislation pertinent to any of the powers conferred by the Constitution, however it may operate collaterally or

incidentally to impair or destroy the obligation of private contracts."

Continental Bank v. *Rock Island Ry. Co.*,
294 U.S. 648, 680.

"The equitable distribution of the bankrupt's assets, or the equitable adjustment of creditors' claims in respect of those assets, by way of reorganization, may therefore be regulated by a bankruptcy law which impairs the obligation of the debtor's contracts. Indeed every bankruptcy law impairs the obligation of the debtor's contracts."

Kuehner v. *Irving Trust Co.*, 299 U.S. 445, 452.

See also:

Hanover National Bank v. *Moyses*,
186 U.S. 181, 188.

New York v. *United States*,
257 U.S. 591, 592, 600, 601.

In re *New York, N.H. & H.R. Co.*,
54 Fed. Supp. 595, 623, 624.

XV

THE STATE COURT HAVING ACTED IN EXCESS OF ITS JURISDICTION, ITS JUDGMENT IS VOID AND THE BANKRUPTCY COURT HAD POWER TO ANNUL THE INTERLOCUTORY INJUNCTION GRANTED BY THE STATE COURT.

Ordinarily, the State Court had jurisdiction of the parties and of the question as to what were the powers of South Western under its Charter but in this case

and under these circumstances, it clearly acted in excess of its powers and beyond its jurisdiction, and, therefore, the Bankruptcy Court had power to declare null and void the interlocutory injunction granted by the State Court Judge of his own motion,

United States v. *Walker*, 109 U.S. 258.
(reviewing many cases on the subject).

Simpson v. *Amarillo Mut. Benevolent Assn.*,
68 S.W. (2d) 397.

Duncan v. *National Union Fire Ins. Co.*,
4 S.W. (2d) 278.

In re *Long Island Properties, Inc.*, 42 F. Supp. 323.

XVI

THE ACQUISITION OF SOUTH WESTERN UNDER THE REORGANIZATION PLAN IS A FEDERAL QUESTION AND NOT A QUESTION OF STATE LAW.

The acquisition of South Western is controlled by Section 5 of the Interstate Commerce Act and Section 77 of the Bankruptcy Act. Even if the State law prohibited the acquisition of South Western by the reorganized company, the question whether it could be so acquired would be a Federal question which arises under the Interstate Commerce Act and Section 77 of the Bankruptcy Act. The majority opinion of the Court of Appeals stated the question "was peculiarly a question of State law". But it is obviously a Federal question.

The following case concerned the merger of the Pere Marquette Railroad Company and the Chesa-

peake and Ohio Railroad Company under Section 5 of the Interstate Commerce Act. The Court holds that the merger was governed by the Federal Act and not by the State law.

Schwabacher v. *U. S., et al.*, 334 U. S. 182.

See also
In re Chicago C. & O. Ry. Co., 108 F. (2d) 587.

Under the State law of Texas, the execution of an oil and gas lease is deemed to pass immediately to the lessee the title to the oil and gas. The income received by the lessor from a Texas gas lease, was taxed not as gain from a capital asset but as ordinary income. The Court held that whether the income received by the lessor was a capital asset or income was a matter of Federal law. The Court said (p. 110):

> "The state law creates legal interests but the federal statute determines when and how they shall be taxed."

Burnet v. *Harmel*, 287 U.S. 103.

Under the law of Wisconsin a certain power of appointment would be held to be a special power. Under the Federal Income Tax Law, "a general power of appointment" is taxable. The Court held that it was entitled to put its own interpretation upon the power of appointment and held that the power was general within the intent of the Revenue Act, notwithstanding it might be classified as special by the law of Wisconsin.

Morgan, Extr. v. *Commissioner*, 309 U.S. 78.

The director of a national bank gave his note to the bank with the understanding it was not to be paid. A receiver of the bank brought a suit against the

director to compel payment of the note. The Court held that the liability of the director was not a matter of State law, but that "judicial determination of the legal consequences of acts condemned by the National Bank Act involves decision of a Federal question".

Deitrick, Receiver, v. *Greaney*, 309 U.S. 190.

to the same effect:

D'Oench Duhme & Co. v. *F.D.I.C.*, 315 U.S. 447.

Under the Federal Revenue Laws, gifts of "future interest" are taxable. The insistence was that under the statutes and judicial decisions of Alabama, where the trust was created and was being administered, that this particular gift was not a gift of "future interest". The Court held (p. 402):

> "But as we have often had occasion to point out, the revenue laws are to be construed in the light of their general purpose to establish a nation-wide scheme of taxation uniform in its application. Hence their provisions are not to be taken as subject to state control or limitation unless the language or necessary implication of the section involved makes its application dependent on state law".

United States v. *Pelzer*, 312 U.S. 399, 402, 403.

Under the decisions of the New York Court of Appeals one who guarantees payment of certificates representing undivided interest in a mortgage, which are sold to investors, thereby impliedly agrees that any claim of his own in the mortgage indebtedness shall be subordinate to those of other certificate holders. The

Court held that although this might be the rule governing rights of claimants in a State liquidation, it was inapplicable to a Federal bankruptcy proceeding because the Bankruptcy Court liquidated insolvent estates in accordance with its own rules.

Prudence Realization Corp. v. *Geist, Trustee*, 316 U.S. 89.

The question in this case was whether a farmer-debtor in Alabama had the right under Section 75 of the Bankruptcy Act to redeem his property which had been sold out under foreclosure. His contention was that under the Alabama Statutes the right of redemption was an individual privilege, was not a property right and therefore did not pass under the Bankruptcy Act. The Court held (p. 328):

> "In the interpretation and application of the Bankruptcy Act as in the case of other federal statutes, federal not local law applies. Prudence Corp. v. Geist, 316 U.S. 89, 95, and cases cited. It is for the bankruptcy court to determine, by reference to the provisions of the bankruptcy Statute, what rights created by state law — regardless of the characterization which may be applied to them by state statutes and decisions — are within the jurisdiction of the bankruptcy Court."

Wragg v. *Federal Land Bank*, 317 U.S. 325.

XVII

THERE IS EVERY REASON WHY THE QUESTION OF THE ACQUISITION OF SOUTH WESTERN SHOULD NOT BE REFERRED TO THE STATE COURT FOR ITS DECISION.

The question is fundamentally a question of Federal law.

A Bankruptcy Court is not at liberty to surrender its exclusive jurisdiction, particularly in a case like this.

Isaac v. *Hobbs Tie & Timber Co.*, 282 U.S. 734, 739.

U.S. Fidelity Co. v. *Bray*, 225 U.S. 205, 218.

In re *New York, N.H. & H.R. Co.*, 54 F. Supp. 595, 624.

Markham, Alien Property Custodian, v. *Allen*, 326 U.S. 490, 495.

But even if the question was one of State law the Bankruptcy Court would have the power and it would be its duty to decide the question, because the Bankruptcy Court and the Commission have exclusive jurisdiction of the subject matter and the Bankruptcy Court has the property in its possession.

Meredith v. *Winter Haven*, 320 U.S. 228.

Williams v. *Green Bay & W.R. Co.*, 326 U.S. 549.

The principle of "forum non conveniens" has no application here and for that reason the two following cases relied on by Respondents are inapplicable.

Thompson, Trustee, v. *Magnolia Petroleum Co.*, 309 U.S. 478.

In re *Central R.R. of New Jersey*, 163 F. (2d) 44.

XVIII

THE OBSERVATION IN THE MAJORITY OPINION OF THE COURT OF APPEALS THAT A SOLVENT CORPORATION CANNOT BE CONSTITUTIONALLY COMPELLED AGAINST ITS WILL TO CONVEY TO THE DEBTOR IS WHOLLY IRRELEVANT.

No one is seeking to compel South Western to convey its property against its wishes. It was entirely

free to reject the offer made to it in the Plan. It has accepted the offer and its acceptance has been assented to by a large majority of its stock. A small minority of stockholders is trying to thwart the wishes of the majority, on the impossible theory that South Western cannot convey its property except by unanimous stockholder consent.

XIX

THE BANKRUPTCY COURT IS NOT BOUND TO FOLLOW THE DECISION OF JUDGE ATKINSON OF THE STATE COURT IN GRANTING THE INTERLOCUTORY INJUNCTION IN THE BENTON CASE.

Respondents contend that the question is one of State law and that the Federal Court is bound to follow the State law as interpreted by the State Court and they particularly rely on Fidelity Union Trust Co. v. Field, 311 U.S. 169, which states the proposition that in the absence of a decision by the highest Court of the State, the Federal Court in deciding a question of State Law, should follow the decision of an intermediate State Court, in the absence of more convincing evidence of what the State law is.

This Court has recently modified the decision in Fidelity Union Trust Co. v. Field and held that a Federal Court in applying local law in a diversity case, is not bound to follow a decision of a court of first-instance which is the only State decision on the subject, where the existence of such a decision can be determined only by examination of Court records and it is not regarded by the State Courts as a binding precedent.

Mary Bell King v. *Order of United Commercial Travellers of America*, 333 U.S. 153.

The circumstances under which Judge Atkinson's decision was rendered do not lend any weight to it. It is purely interlocutory. There is no other decision in the State of Georgia which supports his decision. The facts as to the exigencies which confront South Western were not pleaded, nor in evidence in the Benton case.

XX

IN THE EXIGENCIES WHICH CONFRONT SOUTH WESTERN IT CLEARLY HAS POWER TO SELL ITS PROPERTY TO THE REORGANIZED COMPANY ON THE VOTE OF A MAJORITY OF ITS STOCK, AND THE BANKRUPTCY COURT HAD THE POWER TO DECIDE THE QUESTION IN THE PROCEEDING BEFORE IT.

The Bankruptcy Court had all the parties before it necessary to a decision of the question. The minority stockholders who had raised the question were in Court. If the question is decided against the contention of Benton, et al., there is nothing in their case. The Bankruptcy Court had exclusive jurisdiction of the property and the reorganized proceeding. There is no valid reason why the Bankruptcy Court should not decide the question when its decision was invoked by the Trustee who brought the proceeding. The question cannot be lawfully decided anywhere but in the Bankruptcy Court. The Bankruptcy Court was not compelled to decide the question, because it could sustain the injunction against the Benton proceeding in the State Court on other grounds, but as its decision was invoked and it did decide the question correctly, the Court of Appeals should have affirmed the judgment.

(1) By virtue of Sections 94-328, 94-329, 94-311, and 94-318, of the Code of Georgia which we have

hereinbefore cited, the State of Georgia has consented to the sale, consolidation or merger; so that South Western stands just in the same position as to sale of its property as does any private corporation.

(2) We have set forth in the Statement of Facts in the brief the exigencies which confront South Western which make it necessary and desirable for it to liquidate its property. There is no dispute as to these facts.

(3) There is no decision in Georgia to the effect that a corporation can never under any circumstances sell its property without unanimous consent. The specific question as to whether a corporation can sell its property by a majority vote of its stockholders when it is insolvent or liable to become so, or where the exigencies of the situation make it expedient to sell its property, has never come before the Courts of the State of Georgia.

The nearest form in which a question of this kind came before the Supreme Court of Georgia is the case of *Plant* v. *Macon Oil & Ice Co.*, 103 Ga. 666. In that case the question was whether or not the Defendant should be permitted to make a short term lease of its property without the unanimous consent of its stockholders. The Court held that under the particular circumstances of that case, that such a lease could be made. After reviewing all the authorities, the Court summed up its investigation of the subject as follows:

> "Upon a cursory glance at the authorities above cited, and a number of others we have investigated upon the subject, there would seem

at first to be an irreconcilable conflict upon the powers and rights of a majority and a minority of stockholders in a private corporation, touching its authority to alienate or lease its property and franchises. But we think that nearly if not quite all of the authorities upon the subject can be reconciled, and that from a careful consideration of all of them together can be deduced the following principles, about which there seems to be very little, if any, conflict: 1st. While a public or quasi-public corporation can not, without express authority, convey or lease its property and privileges as a general rule this can be done by a private corporation. 2nd. But a private corporation, limited as to duration, while doing a successful business, can not sell out and abandon its enterprise, over the protest of a minority of its stockholders, who have the right to insist upon a continuance of its business. 3rd. While a minority of stockholders have the right recognized in the paragraph just above, it can not compel a majority to continue indefinitely in the business of the corporation, provided a majority, in arrangements to discontinue the business, fully protect the interests of the minority by payment in full of the value of their shares, should it be demanded. 4th. A minority of stockholders can not compel a corporation, against the wishes of a majority of the owners of the stock therein, to continue a business that would be unprofitable or ruinous in its results to the interests of all concerned; hence it has been often held that an insolvent corporation has the right to make an assignment for the benefit of creditors, which right does not depend upon the assent of all its stockholders."

(4) There are many cases decided by the Supreme Court of Georgia to the effect that when a proposed

amendment to a charter of a corporation is fundamental, radical, or vital, unanimous consent of the stockholders to the acceptance is essential.

To illustrate:

The charter of a railroad company could not be amended so as to adopt all of the provisions of the Act of 1892 relating to the incorporation of railroads, without unanimous consent.

Alexander v. *A. & W.P.R. Co.*, 108 Ga. 151.

A stockholder would be released from a subscription to capital stock if the stock was increased, the route of railroad changed, its name changed, and various extensions made by amendment to its charter.

Snook v. *Ga. Improvement Co.*, 83 Ga. 61.

The capital stock of the corporation could not be increased by amendment without unanimous consent of stockholders.

Atlanta Steel Co. v. *Mynahan*, 138 Ga. 668.

Macon Gas Co. v. *Richter*, 143 Ga. 397.

See also:

Johnson v. *Tribune Herald Co.*, 155 Ga. 204.

(5) There is no prohibition in the charter of the South Western against the sale of its property. This does not mean that the stockholders of the South Western had impliedly contracted with each other that the property could never be sold under any conditions. The

charter is a perpetual one, and it is not to be presumed that the stockholders contracted with each other to forever operate the railroad under any and all conditions, and that they could never under any conditions sell the property.

The great weight of modern authority is to the effect that under the exigencies in which the South Western Railroad finds itself, that it can sell its property on the vote of a majority of its stockholders.

The modern doctrine is thus summed up in Fletcher Cyc. Corporations, Section 5797:

> "The general rule is that a solvent corporation, where not a quasi-public corporation, may transfer all of its property *** The question now for consideration is whether a majority of the stockholders may authorize such a sale as against the dissent of one or more minority stockholders. *** If there is no governing statute or charter provision, the decisions generally classify themselves according to whether (1) the transfer is required by the exigencies of the business, or (2) the transfer is not required by such exigencies. In the first instance, a private corporation, as distinguished from a quasi-public corporation, may transfer all of its property when the exigencies of the business require it to do so, as where it is insolvent or in failing condition, or when the circumstances are such that it can no longer profitably continue its business, even though minority stockholders object thereto, and the power may be exercised by a bare majority of the stockholders, *** And while the rule is generally applied in cases where the corporation is insolvent, and some decisions apparently limit the rule to cases where the corporation is insol-

vent, some decisions do not require actual or technical insolvency. *** On the other hand, it is generally held that where the transfer is not required by the exigencies of the business, as where the corporation is a prosperous and going concern, the transfer cannot be made against the dissent of minority stockholders *** But while the weight of authority denies to the majority stockholders the power to sell all the corporate property, where the corporation is solvent and prosperous, there are decisions authorizing such a sale in any case where the majority deem it expedient so to do, and the trend of the later decisions seems to be in favor of permitting such a sale by the majority, against the dissent of minority stockholders, whenever deemed expedient."

See also: *Fletcher Cyclopedia Corporations*, Sections 2946 and 2947.

The text of Fletcher Cyclopedia Corporations is sustained by all of the text-writers.

See: *Morawetz on Private Corporations* (2 ed.) Section 413.

Noyes (2 ed.) *Intercorporate Relations*, Sections 110 and 111.

Professor Warren in 30 Harvard Law Review 335, at page 358, states his view as follows:

"It is submitted that the holders of a majority of the stock of a corporation organized for profit have the power to cause a transfer of all the corporate assets and a distribution of the proceeds (after satisfying creditors) to the stockholders whenever, for legitimate business reasons, they deem such a course wise. Financial

embarrassment is not the only legitimate business reason for such a transfer. If such a corporation is engaged in a public employment, the consent of the State to the transfer becomes necessary; but this is simply an additional requirement, and in no wise effects the relation of the majority of the stockholders toward the minority."

The Supreme Court of the United States set forth the doctrine thus in *Geddes v. Anaconda Copper Mining Co.*, 254 U.S. 590, 595, 597, 598:

"It is, of course, a general rule of law that, in the absence of special authority so to do, the owners of a majority of the stock of a corporation have not the power to authorize the directors to sell all of the property of the company and thereby abandon the enterprise for which it was organized. But to this rule there is an exception, as well established as the rule itself, viz: that when, from any cause, the business of a corporation, not charged with duties to the public, has proved so unprofitable that there is no reasonable prospect of conducting the business in the future without loss, or when the corporation has not, and cannot obtain, the money necessary to pay its debts and to continue the business for which it was organized, even though it may not be insolvent in the commercial sense, the owners of a majority of the capital stock, in their judgment and discretion exercised in good faith, may authorize the sale of all of the property of the company for an adequate consideration, and distribute among the stockholders what remains of the proceeds after the payment of its debts, even over the objection of the owners of the minority of such stock (citing text-books). The rule that owners of a majority of the stock may not authorize the sale of all of the property of a going

and not unprofitable company, rests upon the principle that exercise of such power would defeat the implied contract among the stockholders to pursue the purpose for which it was chartered. But this principle fails of application when a business, unsuccessful from whatever cause, is suspended without prospect of revival, and the law recognizes that under such conditions the majority stockholders have rights as well as the minority and that it should not require the former to remain powerless until the creeping paralysis of inactivity shall have destroyed the investment of both."

The following case cites many authorities and refers to many text writers to sustain the proposition for which we contend.

Paterson v. *Shattuck Arizona Copper Co.*,
168 Minn. 611; 244 N.W. 281.

Among the many cases to sustain this proposition we cite:

Calnan v. *Guaranty Security Corp.*,
271 Mass. 531; 171 N.E. 830.

Beidenkopf v. *Des Moines Life Ins. Co.*,
160 Iowa 629; 142 N.W. 434.

Inhabitants of Waldoborough v. *Knox. & L.R. Co.*,
84 Me. 469; 24 Atl. 942

Bassett v. *City Bk. & Tr. Co.*, 116 Conn. 617;
165 Atl. 357.

(66) The case of Alexander v. Atlanta & West Point R.R. Co., 108 Ga. 151, (which is relied on by Respondent) merely holds that this Railroad Company could not amend its charter which was a special charter granted by the Legislature by adopting the provisions of the subsequent General Law for the incorporation of

railroads without the unanimous consent of its stockholders, because this was a fundamental and radical change of its charter. The Court did not decide the question whether it was necessary to get unanimous stockholder consent to amend its charter to authorize it to build a belt line railroad (see the last paragraph of the decision). The case did not involve the power to sell in case of insolvency or other exigencies which might make a sale necessary.

The case of City of Knoxville v. Knoxville & Ohio R. Co., 22 Fed. 758 (which is also relied on by Respondents), differs from the case at bar, in that the East Tennessee Railroad Company with which it was proposed to consolidate the Knoxville Railroad owned a majority of the stock of the latter and it was proposed to pay the stockholders of the Knoxville Railroad Company with stock in the East Tennessee Company. The case was decided 63 years ago and even under the facts of the case, is not in harmony with modern authority.

XXI

NOTWITHSTANDING CONSUMMATION OF THE PLAN SINCE THE CERTIORARI WAS GRANTED, THE REORGANIZATION PROCEEDINGS HAVE BEEN KEPT OPEN AS TO SOUTH WESTERN AND AS TO THIS LITIGATION.

The Plan of Reorganization of the Central contemplated that the leased lines should be acquired prior to or upon the consummation of the Plan. It was ob-

vious that the South Western could not be acquired prior to or upon the consummation of the Plan on account of this litigation, and, therefore, the United States District Court passed an order dated March 5, 1948, providing for the acquisition of the South Western properties under the Reorganization Plan within a reasonable time after the termination of this litigation. Under this order the lease of South Western is cancelled as of the consummation date, and if the properties should be acquired under the Plan, the securities allotted under the Plan would be delivered and would draw interest from the consummation date and, in the meantime, the leased line will be operated by the reorganized Company.

The Plan was consummated, except as to the South Western, as of July 1, 1948, by an order of the United States District Court passed June 24, 1948, and the Trustee of the Debtor was authorized by said order to continue this litigation.

The United States District Court also on May 18, 1948, passed an order approving the determination of the Reorganization Managers that the method of acquisition of the leased lines should be by purchase.

The result of all this is that the status quo of the South Western with reference to the Reorganization Plan, is the same now as it was at the time the certiorari was granted in this case.

Certified extracts from the orders of the Court re-
red to above are set forth in Appendix No. 3.

Respectfully submitted,

T. M. Cunningham
Savannah, Ga.

A. R. Lawton, Jr.
Savannah, Ga.

Walter A. Harris,
Macon, Ga.

Attorneys for Merrel P. Callaway, Trustee.

Wallace Miller
Macon, Ga.
Attorney for South Western Railroad Co.

APPENDIX No. 1

APPLICABLE SECTIONS OF THE INTERSTATE COMMERCE ACT. (Italics ours).

Section 1, Paragraph (18), provides:

> "No carrier by railroad *** shall acquire or operate any line of railroad *** unless and until there shall first have been obtained from the Commission, a certificate that the present or future public convenience and necessity require the *** operation *** and no carrier by railroad shall abandon all or any portion of the line of railroad or the operation thereof, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity permit of such abandonment."

Section 1, Paragraph 20, provides:

> "The Commission *** may attach to the issuance of the certificate such terms and conditions as in its judgment the public convenience and necessity may require *** Any operation contrary to the provisions of this paragraph may be enjoined by any court of competent jurisdiction at the suit of *** any party in interest."

Section 5, Paragraph 2 (a), requires approval and authorization of the Interstate Commerce Commission for two or more carriers to consolidate, merge, or for any carrier to purchase, lease or contract to operate the property of another carrier.

Section 5, Paragraph (2) (b) provides:

"If the Commission finds that, subject to such terms and conditions and such modifications as it shall find to be just and reasonable, the proposed transaction is within the scope of subparagraph (a), *and will be consistent with the public interest,* it shall enter an order approving and authorizing such transaction."

Section 5 (4) provides:

"It shall be unlawful for any person, except as provided in paragraph (2), to enter into any transaction within the scope of paragraph (a) thereof."

Section 5, Paragraph 11, provides:

"The authority conferred by this Section *shall be exclusive and plenary,* and any carrier or corporation participating in or resulting from any transaction approved by the Commission thereunder shall have full power (with the assent, in the case of a purchase and sale, a lease, a corporate consolidation or corporate merger, *of a majority unless a different vote is required under applicable State law, in which case the number so required shall assent* of the votes of the holders of the shares entitled to vote of the capital stock of such corporation ***) to carry such transaction into effect and to own and operate any properties and to own and exercise any control or franchises acquired through said transaction *without invoking any approval under State authority*; and any carriers or other corporations, and their officers or employees and any other persons participating in a transaction approved or authorized under the provisions of this section shall be and they are hereby relieved

from the operation of the anti-trust laws and of all other *restraints, limitations and prohibitions of law, Federal, State or municipal in so far as may be necessary,* to enable them to carry into effect the transaction so approved or provided for in accordance with the terms and conditions, if any, imposed by the Commission, and to hold, maintain, and operate any properties and exercise any control or franchise acquired through such transaction. Nothing in this Section shall be construed to create or provide for the creation, directly or indirectly, of a Federal corporation, *but any power granted by this Section to any carrier or other corporation shall be deemed to be in addition to and in modification of its powers under its corporate charter or under the laws of any State".*

APPLICABLE SUB-SECTIONS OF SEC. 77 OF THE BANKRUPTCY ACT. (Italics ours).

Sub-Section (a) provides:

"If the petition is so approved, the Court in which such order is entered shall, during the pendency of the proceedings under this section and for the purposes thereof, have exclusive jurisdiction of the debtor and its property wherever located, and shall have and may exercise in addition to the powers conferred by this section all the powers, not inconsistent with this section, which a Federal Court would have had if it had appointed a receiver in equity for the property of the debtor for any purpose. Process of the Court shall extend to and be valid when served in any judicial district."

Sub-Section (b) provides:

"A plan of reorganization within the meaning of this Section (1) shall include provisions

modifying or altering the rights of creditors generally or of any class of them, secured or unsecured, either through the issuance of new securities of any class or otherwise *** (5) shall provide adequate means for the execution of the plan *which may include the transfer of any interest in or control of all or any part of the property of the debtor to another corporation or corporations, the merger or consolidation of the debtor with another corporation or corporations* *** *the amendment of the charter of the debtor* *** may reject contracts of the debtor which are executory in whole or in part, including unexpired leases; and may include any other appropriate provisions not inconsistent with this Section. The adoption of an executory contract or unexpired lease by the Trustee or Trustees of a debtor shall not preclude the rejection of such a contract or lease in a plan of reorganizaiton approved hereunder, and any claim resulting from such rejection shall not have priority over any other claims against the debtor, because such contract or lease had been previously adopted."

Sub-Section (b) further provides:

"The term 'Creditors', shall include for all purposes of this Section all holders of claims of whatever character against the Debtor or its property whether or not such claims would otherwise constitute possible claims under the Act, including the holders of claims under a contract, executory, in whole or in part, and including an unexpired lease."

Sub-Section (c) (6) provides:

"If a lease of a line of railroad is rejected, and if the lessee, with the approval of the Judge

shall elect no longer to operate the leased line, it shall be the duty of the lessor at the end of a period to be fixed by the Judge to begin the operation of such line, unless the Judge upon the petition of the lessor shall decree after hearing that it would be impracticable and contrary to the public interest for the lessor to operate the said line, in which event it shall be the duty of the lessee to continue operation on or for the account of the lessor until the abandonment of such line is authorized by the Commission in accordance with the provisions of Section 1 of the Interstate Commerce Act as amended."

Sub-Section (f) provides:

"Upon confirmation of the plan, the debtor and any other corporation or corporations organized or to be organized for the purpose of carrying out the plan, shall have full power and authority to, and shall put into effect and carry out the plan and the orders of the Judge relative thereto, under and subject to the supervision and the control of the Judge, the laws of any State or the decision or order of any State authority to the contrary notwithstanding. *** upon confirmation of a plan the Commission shall, without further proceedings, grant authority for the issue of any securities, assumption of obligations, transfer of any property, sale; consolidation or merger of the debtor's property, or pooling of traffic, to the extent contemplated by the plan and not inconsistent with the provisions and purposes of the Interstate Commerce Act as now or hereafter amended."

Sub-Section (f) further provides:

"The Judge may require the trustee or trustees appointed hereunder, the debtor, any mort-

gagee, the trustee of any obligation of the debtor *and all other proper and necessary parties* to make any such transfer or conveyance and may require the debtor to join in any such transfer or conveyance made by the trustee or the trustees."

Section 2 (15) of the Bankruptcy Act provides that bankruptcy courts may "(15) Make such orders, issue such process, and enter such judgments, in addition to those specifically provided for as may be necessary for the enforcement of the provisions of this act: provided, however, that an injunction to restrain a court may be issued by the Judge only".

Section 2 (15) of the Bankruptcy Act (U.S.C.A. Title 11, Section 11) provides that courts of bankruptcy are invested with such authority in equity as to enable them to exercise original jurisdiction in bankruptcy proceedings, including the power to "make such orders, issue such process, and enter such judgments in addition to those specifically provided for as may be necessary for the enforcement of the provisions of this Act."

Judicial Code Section 262 (U.S.C.A. Title 28, Section 377):

"The Supreme Court, the Circuit Courts of Appeals, and the District Courts shall have power to issue all writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the usages and principles of law."

APPENDIX No. 2

Applicable Sections of the Code of Georgia of 1933.

94-328. "AUTHORITY TO SELL OR LEASE RAILROAD. Any railroad corporation organized under the laws of this State, which has heretofore leased its property for a long term of years to another corporation, which lease has terminated, and the lessor is not a going concern or equipped to conduct the operations of a railroad company, is hereby authorized to sell or lease its property, rights, and franchises to another railroad corporation upon such terms as may be agreed upon by the board of directors of the selling or lessor corporation and assented to by the holders of a majority of its stock. (Acts 1933, p. 235)."

94-329. "RIGHTS ACQUIRED. The railroad corporation to which a sale or lease is made under the terms of the preceding section shall acquire all the property, rights, and franchises of the selling, or lessor, corporation. (Acts 1933, p. 235)."

The above two Code Sections are codified from the Act of 1933, p. 235.

Code Section 94-311. "Any railroad company incorporated under this Title shall have the power to make contracts with any railroad company which has constructed or shall hereafter construct any railroad within this State or any other State, that will enable said companies to run their roads in connection with each other, and merge their stocks, or to consolidate with any such company within or without this State, or to lease or purchase the

property of any other such company and hold, use, and occupy the same in such manner as they may deem most beneficial to their interests: Provided, that no railroad shall purchase a competing line of railroad, or enter into any contract with a competing line of railroad calculated to defeat or lessen competition in this State; and any violation of this section shall subject the corporation to all the penalties incident to such violation of the law. (Acts 1892, p. 49)."

Code Section 94-318. "Any railroad Company incorporated under the provisions of this title shall have authority to sell, lease, assign or transfer its stock, property and franchises to, or to consolidate the same with those of any other railroad company incorporated under the laws of this or any other state or of the United States, whose railroad within or without the state shall connect with or form a continuous line with the railroad incorporated under the law, upon such terms as may be agreed upon; and conversely any such corporation organized under the provisions of this title may purchase, lease, consolidate with, absorb and merge into itself the stock, property and franchises of any other railroad company incorporated under the laws of this or any other state or the United States, whose railroad within or without this state shall connect with and form a continuous line or system with the railroad of such company incorporated under this title upon such terms as may be agreed upon."

The above two Code Sections are a part of Title 94 of the Code of Georgia of 1933, which contains the law for the incorporation of railroad companies and was passed in 1892 (Acts 1892, pp. 49, 51).

APPENDIX No. 3

EXTRACTS FROM ORDERS OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF GEORGIA, IN THE MATTER OF CENTRAL OF GEORGIA RAILWAY COMPANY, DEBTOR, IN PROCEEDINGS FOR THE REORGANIZATION OF A RAILROAD. NO. 4829.

ORDER OF MARCH 5, 1948.

Upon consideration of the foregoing petition of the Reorganization Managers of Central of Georgia Railway Company praying that the Court construe or cure certain defects in the Plan, authorize the acquisition of the properties of South Western Railroad Company subsequent to the consummation date and provide for the rejection of the lease of South Western Railroad Company and the operation of its lines of railroad for the account of the lessor by the Reorganized Company, and all parties having been heard or given an opportunity to be heard, and the Court being fully advised in the premises, it is ORDERED:

1. In the exercise of the Court's power under the provision of the Plan entitled "Construction of plan" the Plan is hereby deemed to provide that, if the properties of the South Western Railroad Company can be acquired on the terms set forth in the Plan, it is the duty of the Reorganization Managers to effect their acquisition; that, if practicable, such properties should be so acquired prior to or upon the consummation date; that, if such properties cannot be acquired on the terms set forth in the Plan, the lease of the South Western should be rejected as of the consummation date; that

the rental under the lease of the South Western should be paid until the acquisition of the properties of the South Western if such acquisition precedes the consummation date, or until the rejection of the lease of the South Western becomes effective if such lease be rejected, and that any bonds to be issued under the Plan for the properties of the South Western should not bear interest for any period for which the lease rental shall have been paid.

2. In the exercise of the Court's power under the provision of the Plan entitled "Construction of plan" the words "as a result of the acceptance of the plan by the leased-line security holders" are hereby deleted from the second sentence of the second paragraph under the heading "Reorganized company".

3. In the exercise of the Court's power under the provision of the Plan entitled "Construction of plan", the sentence in the Plan under the heading "Reorganized company" reading "Securities allotted to the leased lines shall not bear interest or dividends for any period prior to acquisition of the respective leased line" is hereby deemed to provide that no interest or dividends shall accrue on securities allotted for the properties of a leased line for any period for which rental under the lease of such line shall be paid and that if South Western Railroad Company should be acquired subsequent to the consummation date the bonds to be issued for the properties of the South Western should bear interest from the consummation date, the interest on the Income Bonds to be contingent.

4. (a) The lease of the South Western Railroad Company is rejected as of the consummation date; and

(b) From and after the consummation date the Reorganized Company shall operate the lines of the South Western for the account of the South Western subject to the jurisdiction of this Court;

provided that, if the properties of the South Western be acquired on the terms set forth in the Plan subsequent to the consummation date and within a reasonable time after the termination of the litigation now pending, the effect of such acquisition shall be the same as if such properties had been acquired on such terms on the consummation date, and the result of operation by the Reorganized Company of South Western's railroads for the account of South Western, whether a profit or a loss, shall not affect the amount of bonds distributable under the Plan to South Western Railroad Company, or the interest payable thereon from the consummation date.

This 5 day of March, 1948.

Enter,

F. M. SCARLETT,
Judge, United States District Court.

Filed in office this 5 day of March, 1948.

LENA W. SEMKEN,
Deputy Clerk.

EXTRACT FROM ORDER OF MAY 18, 1948.

"The determination of the Reorganization Managers that the method of acquisition of the properties of South Western Railroad Company, Augusta and Savannah Railroad and The Chattahoochee & Gulf Railroad Company be by purchase is hereby approved."

EXTRACTS FROM CONSUMMATION ORDER OF JUNE 24, 1948.

"The Reorganization Managers and the Reorganized Company are hereby authorized and directed to proceed with and complete the consummation of the Plan, except with respect to South Western Railroad Company, in accordance with the terms and provisions thereof***."

"Except as otherwise provided in this Order, at 12:01 A.M., Eastern Standard Time, on July 1, 1948 (referred to in this Order as the Consummation date), all right, title, and interest of the Trustee of the Debtor's properties *** and all rights, privileges, and franchises of the Debtor shall, the laws of any State or the decisions or orders of any State authority to the contrary notwithstanding, vest in and become the absolute property of the Debtor, Central of Georgia Railway Company, as reorganized***."

"From and after the consummation date the reorganization proceedings shall not be terminated but shall remain open, and said Trustee and his Counsel shall continue in office until the further order of the Court."

"The Reorganized Company shall have the right, if it so elects, to be substituted at its own cost and expense as a party in lieu of the Trustee

of the properties of the Debtor, in any or all litigation or proceedings by or against the said Trustee now pending on appeal or otherwise, or to continue such litigation or proceedings in the name or names of the present parties thereto."

I, Scott A. Edwards, Clerk of the United States District Court for the Southern District of Georgia, do hereby certify that the foregoing is a true and correct copy of the order of said Court dated March 5, 1948 and of the extracts from the orders of said Court dated May 18, 1948 and June 24, 1948, in the proceedings for the reorganization of Central of Georgia Railway Company.

In witness whereof I have signed this Certificate and attached the seal of said Court this 1st day of September 1948.

SCOTT A. EDWARDS,
Clerk United States District Court for the Southern District of Georgia.

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Supreme Court of The United States

October Term 1948

No. 21

MERREL P. CALLAWAY, AS TRUSTEE OF THE PROPERTY OF CENTRAL OF GEORGIA RAILWAY COMPANY, DEBTOR, ET AL., PETITIONERS

Vs.

L. O. BENTON, JR., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF TO THE BRIEF FOR RESPONDENTS

T. M. Cunningham,

A. R. Lawton, Jr.,

Walter A. Harris,
Attorneys for Merrel P. Callaway, Trustee.

Wallace Miller,
Attorney for South Western Railroad Company.

Dated: October 15, 1948.

Supreme Court of The United States

October Term 1948

No. 21

MERREL P. CALLAWAY, AS TRUSTEE OF THE PROPERTY OF CENTRAL OF GEORGIA RAILWAY COMPANY, DEBTOR, ET AL., PETITIONERS

Vs.

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ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF TO THE BRIEF FOR RESPONDENTS

I

AS TO THE CONTENTION IN RESPONDENTS' BRIEF THAT NEITHER THE PLAN, NOR THE ORDER OF COURT APPROVING THE PLAN PROVIDE THAT THE PROPERTIES OF SOUTH WESTERN MAY BE ACQUIRED BY A SIMPLE MAJORITY VOTE OF THE STOCKHOLDERS OF THE COMPANY.

The Plan did not say any thing about the vote of stockholders, because this is a matter which is regulated by the Federal Statutes. Section 5 (11) of the Inter-

state Commerce Act provides for a majority vote of stockholders unless a different vote is required under applicable State law. This Section further relieves the carrier from the "restraints, limitations and prohibitions of law, Federal, State or Municipal in so far as may be necessary to enable them to carry into effect the transaction so approved"; and this Section further provides that the powers granted by the Section "shall be deemed to be in addition to and in modification of its powers under its corporate charter or under the laws of any State." The authority conferred by this section is "exclusive and plenary." If there is any State Statute which comes into conflict with this Federal law, the State Statute must yield.

Section 77 (f) of the Bankruptcy Statute gives authority to carry out the plan, "the laws of any State or the decision or order of any State authority to the contrary notwithstanding."

The reorganization is controlled by Federal law and not by State law.

We have called attention in our main brief (p. 9) to the provision in the last paragraph of the Plan (R. 47) which provides that nothing contained in the plan shall be construed as a grant of authority for the issue of securities, transfer of any property, sale, consolidation or merger of the Debtor's property "until further action by the Commission upon confirmation of the plan by the Court." Benton's suit was brought before the confirmation of the plan and the State Court usurped the functions and power of the Commission and the Reorganization Court in decreeing that the

South Western should not accept the plan without unanimous stockholder consent. The State Court passed this decree after South Western's stockholders by a large majority had assented to the plan and the corporation had notified the Commission of its acceptance.

II

NEITHER THE COMMISSION NOR THE COURT ABANDONED THEIR RESPECTIVE FUNCTIONS TO PASS ON THE ACCEPTANCE OF THE PLAN OR ITS VALIDITY.

The Respondents' Brief reiterates in three places (pp. 18, 20 and 23): "Whether the properties of this Company could be acquired by the Debtor or the reorganized Company on the terms set forth in the plan was left by the Commission and by this Honorable Court to the stockholders of the Company to decide. Whether the acceptance on the part of the Company could be based on a vote of the majority of the outstanding stock was a question as to which this Respondent and other stockholders on the one hand and the officers of the Company, on the other hand, differed." And again Respondents brief states (p. 20): "The stockholders are in dispute as to what constitutes a valid acceptance."

Respondents' Brief goes on to argue because the officers of the Company and the minority stockholders differed on this subject the State Court had the right to decide the dispute and to ignore the fact that there was a reorganization proceeding pending in the Federal Court which was directly concerned with this matter. The Benton case ignored the Trustee of the Debtor's property and did not make him a party to the suit, and yet this suit invoked a decision from the State

Court enjoining the acceptance of the reorganization plan, which was a matter of which the Reorganization Court necessarily had exclusive jurisdiction and the State Court enjoined the South Western and its Officers and Directors "from doing or performing any act in behalf of the defendant railroad company which might tend to consummate the plan of reorganization of the Central of Georgia Railway Company with respect to the acquisition of the properties of South Western Railroad Company."

This was a flagrant violation of the jurisdiction and powers of the reorganization Court.

It is a curious contention that because a minority stockholder choses to raise the contention that the Corporation of which he is a stockholder cannot convey its property without unanimous stockholder consent, the reorganization Court thereby loses its jurisdiction over the acceptance of the plan and the validity of the acceptance, which are matters within the frame work of the reorganization process. In other words the functions of the Court and the Commission are to be ignored while the stockholders fight out among themselves a question over which the Federal Statutes have taken exclusive and plenary jurisdiction.

Respondents' Brief further argues that because no one had raised in the Bankruptcy proceeding the contention that South Western could not convey its property without unanimous stockholder consent, that he was at liberty to raise this question in the State Court and because he first raised the question in the State Court, the State Court had prior jurisdiction over the question.

No one had raised the question in the reorganization proceeding because there is nothing in the point, and if the Respondent prevails on this question, although he might win his case, he would lose his property. Moreover South Western was a party to the reorganization proceedings, and its acceptance or rejection of the plan had to take place in the reorganization proceeding, therefore the proper and the only place to raise this question was in the reorganization Court.

III

THE CONTENTION IN THE BENTON SUIT OF MISMANAGEMENT OF SOUTH WESTERN IS NOT INVOLVED IN THE PROCEEDING BROUGHT BY THE TRUSTEE OF THE DEBTOR TO ENJOIN THE BENTON SUIT.

In heavy black letters Respondent's Brief (p. 16) states, "The Federal Court was not asked to adjudicate the question of mismanagement." This statement is correct. There was no reason why the Trustee of the Debtor should have asked the reorganization Court to explore the allegations of mismanagement in the Benton Suit. It was no concern of the reorganization plan whether there was mismanagement of South Western or not; that question did not bear on the validity of the acceptance by South Western of the plan.

The mismanagement alleged in the Benton Suit (R. 114, par. 61) was as follows: "The action of the Board of Directors in disobeying the repeated and almost unanimous desires of the stockholders with respect to a sale of these properties, constitutes a strong case of mismanagement which should be enjoined by this Court of Equity." The allegations preceeding para-

graph 61 of the Benton Suit are to the effect that on several occasions both the Directors and Stockholders of South Western passed strong resolutions stating that the proposal of the plan was unfair and inadequate and that it should be rejected. All of these meetings were held prior to the submission of the plan by the Commission to South Western for its acceptance or rejection. The plan was not submitted by the Commission to South Western until February 11th, 1947 (R. 48, par. 12). Prior to this time South Western had made strenuous efforts to sell or lease its property, and had not succeeded in doing so. The "ox was in the ditch" and South Western then had to make a fateful decision. The Directors of South Western decided it was expedient to accept the plan (R. 116). These resolutions were transmitted to the stockholders and were accompanied by a letter from the President of the Company dated March 14, 1947 fully explaining why previously the Directors had taken the position that the plan should be rejected and why under the exigencies of the situation they had changed their minds and now recommended its acceptance (R. 80). This letter was followed by three other letters from the President of South Western to its stockholders explaining why the Directors had recommended the acceptance of the plan (R. 84).

Benton's suit also criticized the Directors of South Western for not taking an appeal from the order of the Court approving the plan and the allotment made to South Western.

The response of South Western (R. 122) fully explained why the Directors had finally concluded to

advise the acceptance of the plan and the futility of an appeal from the order approving the plan.

Finally, the Judge of the State Court in his order passed April 24, 1947 (R. 173, 174) held that under the evidence there was no mismanagement and the relief sought on that ground was unwarranted.

IV

THE CONTENTION AS TO SOLICITATION OF PROXIES.

The Respondents raise this question in the Statement of Facts in their brief (pp. 18 and 19) and argue it (pp. 58-61), and rest their contention on Section 77 (p) of the Bankruptcy Act copied in the appendix of their brief.

The Act makes it unlawful for any person during the pendency of a reorganization proceeding to solicit any proxy "from any creditor or shareholder of any railroad corporation by or against whom such proceedings have been instituted."

The plan was submitted by the Commission to South Western Railroad Company for acceptance or rejection. It was not submitted by the Commission to the stockholders of South Western (R. 48, 49). The Company accepted the plan subject to the assent of its stockholders (R. 116). 30,137 shares of stock voted to accept the plan and 9,057 voted against acceptance (R. 49). The Capital Stock of South Western consists of 51,911 shares (R. 44).

The contention in the response of Benton, et al. to the petition of M. P. Callaway, the Debtor's Trustee

(R. 14) was that proxies for 6,269 shares of South Western stock had been solicited by Samuel L. Varnadoe, a stock broker employed by the management of the Debtor.

There was no proof whatever that the Management had employed Varnadoe. On page 17 of Respondent's brief reference is made to a statement of the Attorney for Benton et al made by him at the Stockholders meeting in which he said that "it is my information—I don't state it as a fact—I want to state it is my information, those shares (referring to the 6,269 shares) were obtained by solicitation of Varnadoe, Chisholm & Co. or their employees, upon the employment of the Central of Georgia Railway Co." The pleading further stated "Mr. Varnadoe, a member of said brokerage firm and Mr. T. M. Cunningham, Counsel for the Trustee were present when this statement was made. It was not denied." There was no obligation on either Mr. Varnadoe or Mr. Cunningham to either admit or deny the statement of Benton's attorney.

Under the facts found by the District Court (R. 54 par. 23) the District Court found, "It appears from the undisputed evidence that proxies for 4,990 shares of stock out of the 6,269 shares were not solicited by Mr. Varnadoe, that the holders of these 4,990 shares were all clients of Mr. Varnadoe to whom he had sold the stock and that they voluntarily and of their own motion requested him to represent their stock. He admitted that the proxies for the other 1,279 shares of stock had been solicited by him." There was no finding of fact that the Management of the Debtor or Central of Georgia Railway Company had employed

Mr. Varnadoe. It was stipulated that the findings of fact by the Court were correct (R. 72 par. 2).

So that the question which is raised is not borne out by the facts. The vote for acceptance was 30,137. Throwing out the 1,279 votes which were solicited, there would remain 28,858 votes for acceptance and a majority of votes is 25,956.

But the solicitation of proxies from the stockholders of South Western does not fall within sub section (p) of Section 77 of the Bankruptcy Act and is not unlawful.

The Act merely prohibits the solicitation of proxies from Creditors and from Stockholders of the Debtor. South Western is a creditor of the Debtor, but no proxy was solicited from South Western. The Corporation by resolution of its Directors accepted the plan, therefore there was no necessity to solicit any proxy from this Creditor. The proxies which were solicited were from the stockholders of South Western. These stockholders were not creditors of the Debtor.

Stockholders are not agents of a corporation, do not own the property of the corporation, can not contract in its behalf and are not liable for its debts. The relation of Debtor and Creditor does not exist between a corporation and its stockholders, and the stockholders are wholly distinct from the corporation.

Cook on Corporations, Sections 267, 271, 709.

If the stockholders of South Western are not creditors of South Western, a fortiori they cannot be creditors of the Debtor.

This statute is in derogation of common right and should be strictly construed.

The District Court in its Conclusions of Law No. 22 (R. 68, 69) held that the contention was not supported by the facts, that is that not enough shares were solicited to affect the result, and that as a matter of law the solicitation of proxies from stockholders of South Western was not prohibited by the Statute.

The Circuit Court of Appeals in its decision did not notice the point.

Respectfully submitted,

T. M. CUNNINGHAM
Savannah, Ga.

A. R. LAWTON, JR.
Savannah, Ga.

WALTER A. HARRIS,
Macon, Ga.
Attorneys for Merrel P. Callaway, Trustee.

WALLACE MILLER
Macon, Ga.
Attorney for South Western Railroad Co.

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IN THE

SUPREME COURT OF THE UNITED STATES.

No. 607.

MERREL P. CALLAWAY, as Trustee of the Central of Georgia Railway Company, Debtor, et al.,
Petitioners,

v.

L. O. BENTON, JR., et al.,
Respondents.

(Petition for Writ of Certiorari to United States Circuit Court of Appeals, Fifth Circuit.)

BRIEF OF RESPONDENTS IN OPPOSITION TO THE GRANTING OF THE WRIT.

CHARLES J. BLOCH,
614-18 Persons Building,
Macon, Georgia,
Attorney for the Respondents.

St. Louis Law Printing Co., 415 North Eighth Street. CEntral 4477.

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IN THE

SUPREME COURT OF THE UNITED STATES.

No. 607.

MERREL P. CALLAWAY, as Trustee of the Central of Georgia Railway Company, Debtor, et al.,
Petitioners,

v.

L. O. BENTON, JR., et al.,
Respondents.

(Petition for Writ of Certiorari to United States Circuit Court of Appeals, Fifth Circuit.)

BRIEF OF RESPONDENTS IN OPPOSITION TO THE GRANTING OF THE WRIT.

PRELIMINARY STATEMENT.

February 13, 1939, the Supreme Court of the United States adopted new, revised rules, effective February 27, 1939, supplanting the revised rules adopted June 5, 1928, effective July 1, 1928, as amended (U. S. C. A., Title 28, following section 354, 1947 Cumulative Annual Pocket Part).

Rule 38 (2) of these new, revised rules provides:

> "The petition shall contain a summary and short statement of the matter involved; a statement particularly disclosing the basis upon which it is contended that this Court has jurisdiction to review the judgment or decree in question (See Rule 12, Par. 1); **the questions presented**; and the reasons relied on for the allowance of the writ. **Only the questions specifically brought forward by the petition for writ of certiorari will be considered.** A supporting brief may be annexed to the petition or presented separately, but it must be direct and concise (See rules 26 and 27). A failure to comply with these requirements will be a sufficient reason for denying the petition. . . ." (Emphasis ours.)

We respectfully suggest that the petition should be denied on account of the utter failure of the petitioners to comply with this rule in at least one respect. There is no statement of "the questions presented." There are, therefore, no "questions specifically brought forward" which can be considered by the Court.

In the division of the petition first numbered 14 (pages 7-13, there is another division numbered 14 on page 14), there are eighteen assignments or specifications of error addressed to the majority opinion and judgment of the Circuit Court of Appeals, which attempt to cover all of the issues which were tried in the District Court, and which seek to have the whole case tried de novo before the Supreme Court, but there is no statement of "the questions presented."

Assignments of error as to the opinion and judgment of the Circuit Court of Appeals are not the equivalent of a statement of the questions presented.

In National Licorice Company v. National Labor Relations Board, 309 U. S. 350 (60 Sup. Ct. 569), your Honors limited your review to the questions specifically raised in the petition for certiorari (309 U. S., at page 357, footnote 2). The Court cited in support of this holding General Talking Pictures Corporation v. Western Electric Company et al., 304 U. S. 175, 58 S. Ct. 849. In the latter case, under the caption "Questions Presented," the petitioner posed three specific questions. The Court said: "Our consideration of the case will be limited to the questions specifically brought forward by the petition" (304 U. S., at page 177).

In the case at bar, there are no "questions specifically brought forward by the petitioner." Suppose the Court granted the petition here. What questions would the Court consider?

In Crown Cork and Seal Company v. Guttmann Company (304 U. S. 159, 58 Sup. Ct. Rep. 842), decided the same day as the General Talking Picture Company case, the Court had held, after stating the specific questions presented by the writ (304 U. S., at pages 160-161): "Our consideration of the case will be limited to these questions."

In Rorick v. Devon Syndicate, Ltd., 307 U. S. 299, 59 S. Ct. 877, the Court said:

> "Of the various questions raised below and briefed here, **only those urged in the petition for certiorari and incidental to their determination will be considered on review**" (307 U. S., at page 303). (Emphasis ours.)

Even prior to the adoption of the new rule, the Court had stated in Helvering, Commissioner, v. Taylor, 293 U. S. 507, 55 Sup. Ct. Rep. 287: "The only question for

consideration is that stated in the petition for the writ of certiorari" (page 511). The question stated was specifically stated (293 U. S., at page 508).

We assume that it will be argued that the statement of these assignments or specifications of error constitute a sufficient statement of "the questions presented" and are "the questions specifically brought forward by the petition for the writ of certiorari."

The history of the rule indicates to us the contrary.

Rule 35, adopted originally in June, 1925 (28 U. S. C. A., following Section 354, at page 423), was a "certiorari rule." It read: "The petition shall contain only a summary and short statement of the matter involved and the reasons relied on for the allowance of the writ. A supporting brief may be included in the petition, but whether so included or presented separately, it must be direct, concise, and in conformity with rules 24 and 25."

That rule 35 was superseded by rule 38 of the Revised Rules of the Supreme Court, adopted June 5, 1928 (505 S. Ct. Rep., page XXXIX). That rule did not require a statement of "the questions presented", nor did it provide that "only the questions specifically brought forward by the petition for writ of certiorari" would be considered.

The present rule 38, adopted February 13, 1939, supplanted the rule 38 of June 5, 1928, and for the first time injects the requirement of a statement of the questions presented and the consequent provision as to what questions would be considered by the Court.

The Court, by inserting in 1939 the new language into the rule, must have had a purpose in mind, and it seems to us that that purpose was to require questions of law to be specifically, distinctly, and definitely stated in peti-

tions for the writ, in order that the Court might review important questions of law and not cases as a whole.

We have thought, and respectfully suggest, that under the Revised Rule 38, a petitioner for the writ of certiorari should present his questions, should "bring forward" specific questions of law with the same definiteness and clarity required by a Court of Appeals in certifying questions under rule 37.

Rule 37 (U. S. C. A., Title 28, following Section 354, 1947 Cumulative Annual Pocket Part, page 161) is:

> "Where a Circuit Court of Appeals or the United States Court of Appeals for the District of Columbia, shall certify to this Court a question or proposition of law, concerning which it desires instruction for the proper decision of a cause, the certificate shall contain a statement of the nature of the cause and of the facts on which such question or proposition of law arises. Questions of fact cannot be so certified. Only questions or propositions of law may be certified, and they must be distinct and definite."

Applying to this rule, the Court has repeatedly held that it will not answer questions of objectionable generality. White v. Johnson et al., 282 U. S. 367, 51 Sup. Ct. 115, and cases cited, 282 U. S., at page 371.

In applying rule 37, the Court has said:

> "The Court cannot be called upon to answer questions of objectionable generality, or to review proceedings, facts, and circumstances for the purpose of deciding a variety of preliminary questions in order to reach and decide 'an ultimate question submitted.'"

Pflueger et al. v. Sherman et al., 293 U. S. 55, 58, 55 Sup. Ct. 10, 11.

The vice in the petition here is demonstrated by an attempt to answer this question: If the Court should grant this petition, what questions would it consider?

We have many times noted that in granting petitions for certiorari, the Court limits the grant to a consideration of only certain questions of those presented. For example, in Newberger, Petitioner, v. Commissioner of Internal Revenue, 310 U. S. 655; 60 S. Ct. 1085, the Court granted a petition for writ of certiorari "limited to the second and third questions thereby presented." In Dize v. Maddrix, 323 U. S. 702, 65 Sup. Ct. 135, the petition was granted "limited to question 2 (d) presented by the petition for the writ . . ."

In Mason v. Paradise Irrigation District, 326 U. S. 704, 66 Sup. Ct. Rep. 54, the petition was granted "limited to the question whether any applicable rule requiring equality of treatment among creditors was violated by the difference between the treatment accorded the petitioner and that accorded the Reconstruction Finance Corporation under the approved plan."

In United States ex rel. David Goodman, Petitioner, v. Hearn, 328 U. S. 833, 66 Sup. Ct. 1375, the petition was granted "limited to the third and fourth questions in the petition for writ of certiorari."

These instances (which could be supplemented with many others, no doubt) indicate to us that under rule 38 as it has been revised, questions of law and not cases in their entirety are reviewed by the court on certiorari. Where no questions are stated in the petition, there is no petition.

STATEMENT OF THE CASE.

We are not content with the "summary and short statement" of the matter involved as it appears in the petition, in the light of the fact that there are no specific questions presented for the Court's consideration and for our response. Inasmuch as the whole case is placed before the Court, we prefer that it be presented as it was in the Circuit Court of Appeals.

Respondents (appellants there) stated the case in their brief as follows:

1.

March 25, 1947, L. O. Benton, Jr., and Charles J. Haden, as stockholders of South Western Rail Road Company (sometimes hereinafter called "South Western") brought a petition in equity in behalf of themselves and others similarly situated who cared to intervene against the South Western, its officers, and Directors in the Superior Court of Bibb County, Georgia (R., page 133).

The prayers of this petition were as follows:

> "That the defendant officers and Directors of The South Western Rail Road Company be restrained and enjoined from holding a stockholders' meeting on March 28, 1947, and from submitting to such meeting the proposed plan to sell the railroad properties of The South Western Rail Road Company.
>
> "If this Honorable Court should not restrain and enjoin the holding of the stockholders' meeting, as herein prayed, and if at that meeting a mere majority of the stockholders should vote in favor of the acceptance of the plan and the resulting sale of all the railroad properties of the defendant corporation, that the

officers and Directors of the defendant Company be restrained and enjoined from carrying such action of the stockholders into effect, and specifically that the officers and Directors be restrained and enjoined from filing with the District Court of the United States for the Southern District of Georgia, or with the Interstate Commerce Commission any acceptance of the plan, and that the officers and Directors of the defendant Company be specifically restrained and enjoined from selling to the re-organized company, or to any one else, or any other company, all the defendant Company's railroad properties, rights, and franchises, and be specifically restrained and enjoined from executing any written instrument which might convey the fee-simple title to the property just mentioned unto the re-organized company or any other company; and be specifically restrained and enjoined from doing and performing any act in behalf of The South Western Rail Road Company which might tend to consummate the plan of reorganization of Central of Georgia Railway Company with respect to the acquisition of the properties of The South Western Rail Road Company;

"For such other and further relief as to the Court may seem meet and proper."

(a) With respect to the South Western, this petition showed that South Western was a railroad corporation, having its principal office and place of business in Bibb County, Georgia, incorporated by an Act of the General Assembly of Georgia approved December 27, 1845, which Act and amendments thereto accepted by it constitute its charter. This original charter, as evidenced by the Act of 1845, was several times amended by the General Assembly of Georgia prior to the general Railroad Incorporation Act of 1892. Each of the amendments was accepted by the South Western.

No amendment to its charter made any provision as to the sale of its railroad properties, and its charter is silent with respect thereto.

Therefore, the right to sell the entire properties of the South Western is governed by the general law as it existed at the time of the grant of the charter and the amendments. Under that general law, a majority of the stockholders are not empowered to sell the properties of the Company.

The South Western is a prosperous, going corporation, able to achieve the objects of its corporation, and neither its officers nor a majority of its stockholders have a right to sell its corporate property, or so much thereof as may prevent the continuance of its business as a corporation, and the carrying out of the purposes of its formation.

The capital stock of the South Western is $5,191,100.00, all of which is represented by common stock. Its properties are free from mortgage or other liens. It owes no bonded indebtedness. Its current indebtedness, on December 31, 1946, was $212,610.33, most of which had been paid at the time of the filing of the suit, and its current liabilities were less than $100,000.00.

Of the 51,191 shares of the capital stock of the Company, 50,471 were outstanding, in the hands of the public. According to the report of the Board of Directors of the South Western submitted to the one hundredth annual convention of stockholders of the Company, held in Macon, Georgia, on March 13, 1947, its road and equipment property are worth $9,523,736.81, and therefore its common stock has a book value in excess of $180.00 per share based on fixed assets alone.

In 1942 the Interstate Commerce Commission valued the road and equipment property at $12,830,257.00. According

to this valuation, its common stock would have a value, based on fixed assets alone, of approximately $240.00 per share.

The South Western comprises some 340 miles of railroads, bridges; and depots, and appurtenances thereto, in the heart of the system of the Central of Georgia Railway. Emanating from Macon, the lines of the South Western form that part of the Central of Georgia System extending from Macon through Fort Valley to Columbus; from Macon through Fort Valley to Americus, Smithville, Albany, and Columbia, Alabama. There joins with the latter line at Smithville a branch which extends from Smithville to Eufaula, Alabama.

Without the South Western, the Central of Georgia could not operate trains from Florida through Macon to the north and west. Without the South Western; the Central could not operate trains from, the coal fields which it touches at Birmingham, Alabama, and vicinity, to Savannah and coast. Without the South Western the Central would have no line from Macon to Alabama.

On December 19, 1932, the South Western was being operated by the Central under a long term lease, which produced to the South Western a rental sufficient to pay stockholders an annual dividend of 5 per cent. This annual rental was $259,550.00 and taxes and organization expense. On that date, in an equity cause in the Southern District of Georgia against the Central, H. D. Pollard was appointed Receiver of the property and assets of the Central. He continued to operate the properties of the Central and continued to operate South Western under lease until June 19, 1940, at which time the Central filed its petition in the District Court of the United States for the Southern District of Georgia, stating that it was unable to meet its

debts as they matured, and that they desired to file a plan of reorganization under the provisions of Section 77 of the Federal Bankruptcy Act. Thereafter, in conformity with the Act, on August 9, 1940, H. D. Pollard and A. B. Lovett were appointed Trustees. Trustees have continued to operate the business of the Central, subject to the control of the District Court and subject to the jurisdiction of the Interstate Commerce Commission, except that by death of other Trustees, Merrel P. Callaway has since April 20, 1942, been the sole Trustee of the property of the Central of Georgia Railway Company. As such, he has continued to operate the lines of the South Western under lease, and on October 21, 1943, he adopted the South Western lease for the duration of the bankruptcy.

(b) With respect to the plan, the petition showed that on January 28, 1944, Mr. Callaway, as Trustee, filed his plan of reorganization with the District Court of the United States for the Southern District of Georgia, and contemporaneously filed it with the Interstate Commerce Commission. The plan was amended subsequently, but explicitly with respect to the South Western it provided:

> **"Prior to or upon consummation of the plan, the debtor shall also acquire, if they can be acquired on the terms hereinafter set forth, properties at present leased to the debtor by the South Western Rail Road. . . . If any of these properties shall not be acquired as a result of the acceptance of the plan by the leased line security holders, then and in that event the lease or leases of any line or lines not so acquired, shall be disaffirmed as of such time at or prior to the consummation of the plan as the Court may direct. The method of acquisition, whether through purchase, merger, or consolidation, shall, subject to the approval of the Commission and the Court, be determined by**

the Trustee or by the Reorganization Managers, when they begin to function. If the leased lines are acquired, the railroads of each of the three and the personal property appertaining thereto, and all the real estate owned by each lessor shall be conveyed to the reorganized Company; each of said lessors shall waive any damage to which it has become or shall become entitled on account of any breach of lease; and the South Western Rail Road Company shall waive all claims in respect to equipment. Such conveyances and waivers shall in each instance be the sole consideration of the delivery to each of the respective lessors of the securities proposed to be allocated to it, as hereinafter specified" (R., pages 138-9).

The debtor referred to hereinabove is the Central of Georgia Railway Company.

The securities proposed to be allocated to holders of South Western Rail Road Company capital stock referred to in the above-quoted portion of the plan, were provided for in the plan as follows:

> "Holders of South Western Railroad capital stock would receive for each $1,000.00 of stock, $423.00 in new first mortgage, Series A bonds, and $340.97 in new income mortgage, Series A bonds of the proposed reorganized Company" (R., pages 139-40).

The proposed new first mortgage bonds would be secured by the first lien, subject as to equipment to the liens of equipment obligations, on all railroads owned by the reorganized Company on consummation of the plan, including leaseholds and capital stocks of terminal companies. They would also be secured by a similar lien on the stock of the Ocean Steamship Company and certain other securities and property, and the mortgage securing

them would contain an appropriate after-acquired property clause.

New income mortgage bonds would be secured by a lien, subject to the lien of the first mortgage bonds, upon all property from time to time subject to the lien of that mortgage.

There would be presently issued under the plan, $14,000,000.00 of first mortgage bonds and $16,000,000.00 of income mortgage bonds. Of these first mortgage bonds there would be issued to the South Western stockholders approximately $2,100,000.00 thereof, and of the income bonds approximately $1,700,000.00 thereof, a total of approximately $3,700,000.00 of bonds for property worth in excess of $9,500,000.00 (R., pages 140-41).

(c) Charges of mismanagement were made against the officers and Directors—the basis of these charges being that on March 13, 1947, the Directors recommended the acceptance of the plan with respect to South Western after having continuously, over a period of three years, rejected it, and called a meeting of stockholders to be held fifteen days later to act upon their recommendation.

It was charged that the officers and Directors were proceeding with plans to accept the offer under the belief that a mere majority of the stockholders could authorize a sale of the properties of the South Western. Petitioner contended that those sections of the Georgia Code (94-328 and 94-329) (R., page 161), which authorize railroads under certain conditions to sell their property by vote of a mere majority of its stock, were inapplicable to the South Western Railroad Company. Those sections were derived from the Acts of 1933, page 235, and for reasons alleged in the petition were contended to be inapplicable to the South Western (R., pages 151-53).

2.

The Judge of the State Court issued a rule on this petition against South Western, its officers and Directors, calling upon them to show cause on March 26, 1947, why they should not be enjoined as prayed (R., page 161). The rule was argued March 26 and 27, 1947, and the Court reserved decision.

3.

On March 28, 1947, the stockholders of South Western held their meeting, and a majority of the capital stock was voted in favor of the acceptance of the plan (R., pages 105-111). The vote was 30,137 for and 9,057 shares against the sale (R., page 108).

Immediately, on the same day, the officers of South Western sent its ballot to Interstate Commerce Commission, signifying South Western's acceptance of the plan.

4.

April 18, 1947, Merrel P. Callaway, as Trustee of the property of the Central, filed a summary petition (R., pages 1-8), in the United States District Court for the Southern District of Georgia, in the matter of Central of Georgia Railway Company, Debtor, a proceeding for the reorganization of a railroad, against L. O. Benton, Jr., and Charles J. Haden, to enjoin them from prosecuting their suit in the State Court. The South Western was made a party defendant in this petition. On this petition the Judge of the District Court issued a temporary restraining order (pages 10-11 of R.) against L. O. Benton, Jr., and Charles J. Haden, restraining them from prosecuting their suit in the Superior Court of Bibb County, Georgia, or elsewhere than in the District Court, and also restraining all

other stockholders from prosecuting similar suits elsewhere than in that proceeding; and at the same time the District Court issued a rule to show cause why a permanent injunction should not issue, which rule was returnable May 26, 1947.

5.

On April 24, 1947, the Judge of the Superior Court of Bibb County, Georgia, of his own motion, issued an interlocutory injunction against the defendants in the State Court suit (R., pages 246-249). He overruled the charges of mismanagement made against the defendant, and put his grant of injunction on the ground that South Western had no charter power to sell its railroad without the unanimous consent of its stockholders. The contention of the petitioners in the State Court had been that such a sale could not be had upon the vote of a mere majority of the stockholders (R., pages 155, 157).

The injunctive part of the State Court's order was:

> "It is therefore ordered that the defendants, the officers and directors of the defendant railroad company, be and each and all of said defendants are hereby restrained and enjoined from carrying into effect any provision for the sale or lease of the railroad properties of the defendant railroad company pursuant to any acceptance or purported acceptance of any plan for any such sale or lease not authorized by a unanimous vote of the stockholders of the defendant company; and specifically that such officers and directors be and they are hereby restrained and enjoined from filing with the District Court of the United States for the Southern District of Georgia, or with the Interstate Commerce Commission any acceptance of such plan; and specifically that such officers and directors

be and they are hereby restrained and enjoined from selling to such reorganized company as may succeed the Central of Georgia Railway Company and its Receiver, or to anyone else, or to any other company, all of the defendant railroad company's railroad properties, rights and franchises; and specifically that such officers and directors be and they are hereby restrained and enjoined from executing any written instrument which might convey the fee simple title to the property just mentioned unto the reorganized company or any other person or company; and specifically that such officers and directors be and they are hereby restrained and enjoined from doing and performing any act in behalf of the defendant railroad company which might tend to consummate the plan of reorganization of the Central of Georgia Railway Company with respect to the acquisition by that Company of the properties of the South Western Railroad Company" (R., page 249).

6.

Merrel P. Callaway, as Trustee, thereupon amended his petition in the District Court by bringing to the attention of that Court the injunctive order of the Superior Court of Bibb County, and by striking Charles J. Haden as one of the respondents, his name having been stricken as a plaintiff in the State Court at his instance (R., pages 32-34).

In this amended petition Callaway, as Trustee, prayed that the District Court adjudicate the question whether, under the laws of Georgia and the circumstances of this case, the unanimous consent of the stockholders of South Western was a condition precedent to the acceptance of the said plan by the South Western and the consummation of the plan by the conveyance of its property to the reorganized Company; and further prayed that the injunc-

tive order of the Superior Court of Bibb County be annulled and declared void, and that when the plan should be confirmed by the District Court that such order might be passed as would make effective the acceptance and consummation of the plan by the South Western.

7.

The case in the District Court was heard on May 26, 1947. Evidence was introduced at the hearing and the case was argued orally and by briefs.

8.

Dr. W. G. Lee, I. L. Domingos, Gordon S. Chapman, J. P. Illges, Jr., and Charles Loridans, all stockholders of South Western, individually and as members of the Executive Committee of the Stockholders Protective Committee of the South Western Rail Road Company, intervened in the District Court in support of the position of L. O. Benton, Jr. The intervention showed that the Stockholders Protective Committee represented shareholders of the South Western owning more than five thousand shares of its stock (R., pages 44-47).

In our brief in the Circuit Court of Appeals we stated as the first of the main questions before that Court:

> "Under the facts and the law applicable thereto, did the Bankruptcy Court have exclusive jurisdiction to determine whether the properties of South Western could be acquired by the Central on the terms set forth in the plan by the mere majority vote of the stockholders of South Western?"

We filed a supplemental brief which we hoped would be helpful to the Circuit Court of Appeals in its consideration of the factual element involved in the stated question.

That brief contained a chronological table of events, as follows:

January 28, 1944. Trustees filed plan of reorganization with District Court and Interstate Commerce Commission (R. 138).

March 9, 1944. Stockholders of South Western passed, by unanimous vote of those present (save for 100 shares dissenting), resolution: ". . . that the terms of the purchase proposed by the Trustee are hereby declared to be grossly unfair and inadequate to South Western Rail Road and are hereby unhesitatingly rejected" (R. 141).

March 8, 1945. By the same vote, at the 1945 annual meeting of stockholders, the 1944 resolution was reaffirmed (R. 141).

March 14, 1946. Directors of South Western submitted report to annual meeting of stockholders, stating: "The stockholders of this Company in meeting assembled, and upon two occasions, have rejected the price offered for their property in the plan of reorganization. The offer for that property, in the opinion of your Directors, is entirely inadequate, unfair and unjust to the stockholders of this Company. The conclusions reached in the plan are based on misleading and unreliable figures, and seem to totally ignore the fact that the property of this Company is necessary and indispensable to the successful operation of the Central System as a whole" (R. 143).

March 14, 1946. Stockholders unanimously reaffirmed 1944 resolution, rejecting the Trustee's offer (R. 143).

June 24, 1946. Opinion of the District Judge, approving plan of reorganization, in which he stated: "If the lessors do not accept the proposition to acquire their

lines, they are, on disaffirmance, at liberty to take their properties back" (R. 112).

January 25, 1945. At Directors' meeting of South Western, primary purpose of which was to decide what, if any, recommendation Board would make to stockholders, it was decided that board would take no action on question "at this meeting" (R. 145).

March 13, 1947. Annual meeting of stockholders of South Western held. No recommendation made by Board to stockholders. No action taken by stockholders with respect to offer (R. 147).

(It was at this meeting that President, and old Board of Directors were re-elected.)

Later in day on March 13, 1947. Upon adjournment of stockholders' meeting, Board of Directors, two absent, accepted provisions of plan regarding South Western, subject to acceptance by stockholders at meeting to be held March 28, 1947 (R. 147).

March 19, 1947. L. O. Benton, Jr., a stockholder of South Western, requested postponement of meeting of March 28 for sixty days, and requested that before any proposition of sale was submitted to stockholders, that Directors have another meeting at which he and others might present their views. These requests were refused (R. 150).

March 25, 1947. Suit in State Court Filed by Benton (R. 133, 161).

March 26-27, 1947. Hearing in State Court on prayers for injunction (R. 161, 165-230). No decision then made by State Court Judge.

March 28, 1947. Adjourned annual meeting of stockholders of South Western held, and offer for properties

accepted by vote of 30,137 shares to 9,057 shares (R. 65). (Approximately 12,000 shares not voting.)

April 18, 1947. Callaway, as Trustee, files suit in Federal Court to enjoin Benton and other stockholders of South Western from prosecuting State Court suit. Temporary restraining order granted (R. 1, 11).

April 24, 1947. State Court Judge issued interlocutory injunction, enjoining officers and Directors of South Western from selling properties, etc. (R. 27, 30-1).

May 26, 1947. Callaway, as Trustee, amended his Federal Court action, praying for adjudication by Federal Court of matters involved in State Court suit, to which he was not a party, and praying annulment by Federal Court of State Court's interlocutory injunction (R. 32).

August 15, 1947. Federal Court Judge granted permanent injunction, enjoining Benton and others from prosecuting State Court suit, and annulling and declaring void the State Court's injunction (R. 93).

The Circuit Court of Appeals reversed the District Court (two Judges concurring, one dissenting). The opinion is, of course, in the record here.

BRIEF AND ARGUMENT.

We urged the application, by the Courts below to the facts of the case at bar, of Section 265 of the Judicial Code, which is:

> "The writ of injunction shall not be granted by any Court of the United States, to stay proceedings in any Court of a state **except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy**" (28 U. S. C. A., Section 379). (Emphasis ours.)

We realized that in addition to the statutory exception emphasized in the section just quoted, there were exceptions which the Courts had engrafted upon the section. Among these exceptions is (as expressed in a recent Law Review article) "the res exception which allowed injunctions against State Court proceedings which sought to deal with a res under the jurisdiction of the Federal Court" (California Law Review, December, 1947, Vol. 35, No. 4, pages 545, 546 et seq.).

This exception was treated by the Court in Toucey v. New York Life Insurance Company, 314 U. S. 118, 62 S. Ct. 139, as follows:

> "This brings us to applications of Section 265 apart from these statutory qualifications. The early decisions of this Court applied the Act of 1793 as a matter of course. However, a line of cases beginning with Hagan v. Lucas, 10 Pet. 400, 9 L. Ed. 470, holds that the Court, whether federal or state, which first takes possession of a res withdraws the property from the reach of the other. Taylor v. Carryl, 20 How. 583, 597, 15 L. Ed. 1028; Freeman v. Howe, 24 How. 450, 16 L. Ed. 749. See Kline v. Burke Con-

struction Co., 260 U. S. 226, 235, 43 S. Ct. 79, 83, 67 L. Ed. 226, 24 A. L. R. 1077: 'The rank and authority of the (federal and state) courts are equal; but both courts cannot possess or control the same thing at the same time, and any attempt to do so would result in unseemly conflict. The rule, therefore, that the court first acquiring jurisdiction shall proceed without interference from a court of other jurisdiction is a rule of right and of law based upon necessity, **and where the necessity, actual or potential, does not exist, the rule does not apply.** Since that necessity does not exist in actions in rem and does not exist in actions in personam, involving a question of personal liability only, the rule applies in the former but does not apply in the latter.' The Act of 1793 expresses the desire of Congress to avoid friction between the federal government and the states resulting from the intrusion of federal authority into the orderly functioning of a state's judicial process. The reciprocal doctrine of the res cases is but an application of the reason underlying the Act. Contest between the representatives of two distinct judicial systems **over the same physical property** would give rise to actual physical friction. The rule has become well settled, therefore, that Section 265 does not preclude the use of the injunction by a federal court to restrain state proceedings seeking to interfere with **property** in the custody of the court. Farmers Loan & Trust Co. v. Lake Street Elevated R. Co., 177 U. S. 51, 60, 20 S. Ct. 564, 568, 44 L. Ed. 667; Kline v. Burke Construction Co., 260 U. S. 226, 229, 235, 43 S. Ct. 79, 81, 83, 67 L. Ed. 226, 24 A. L. R. 1077; Lion Bonding & Surety Co. v. Karatz, 262 U. S. 77, 88, 89, 43 S. Ct. 480, 484, 67 L. Ed. 871; see Warren, Federal and State Court Interference, 43 Harv. L. Rev. 345, 359-66. And where a state court first acquires control of the res,

the federal courts are disabled from exercising any power over it, by injunction or otherwise. Palmer v. Texas, 212 U. S. 118, 29 S. Ct. 230, 53 L. Ed. 435."

Toucey v. New York Life Insurance Co., 314 U. S., at pages 134-136 (62 S. Ct., at pages 144-145).

What the Circuit Court of Appeals did in the majority opinion was to answer the question hereinabove stated in the negative. In so doing, it necessarily held that neither the statutory exception nor the res exception applied to the facts of the case. We submit that it was correct in so holding. In determining the correctness of the ruling, it is first necessary to determine what is the res with which we are concerned. The res is the properties at present leased to the Central of Georgia Railway Company by the South Western Rail Road—the fee simple title to these properties. The Interstate Commerce Commission in the plan authorized the debtor (Central of Georgia) to acquire those properties if they could be acquired on the terms set forth in the plan. Thus, the Circuit Court of Appeals described the res involved:

"Because the debtor's trustee has actual possession under its lease of certain tangible property of the South Western Railroad Company, the trustee claims to be in possession of all the property in controversy. We do not concur in this contention. The debtor is seeking (not to enforce a lien upon tangible property as in Warren v. Palmer, 310 U. S. 132, but) to acquire the incorporeal reversionary interest of its lessor, which arose by operation of law when the leasehold was carved out of the fee-simple title. This is a vested future interest to commence in possession after the determination of the lease. The lessee is not disputing the lessor's title, but is seeking to acquire it, and is claiming that the bankruptcy court

is administering this intangible asset. The fallacy in the argument is this: In the case of a tangible res, there can be possession in fact as well as in contemplation of law; but in the case of something intangible, possession is purely a legal concept that manifests itself only through recognition of legal consequences. So far as pertinent here, the legal consequences of a debtor's possession of a tangible asset at the time of his bankruptcy are that his trustee in bankruptcy succeeds to the debtor's possession; and that the bankruptcy court, acquiring possession thereby, has summary jurisdiction in rem to adjudicate adverse claims respecting the asset. Therefore, for practical reasons, the law attaches to the ownership of intangible property the legal consequences of possession of a tangible res. Thus in this case the law limits the possession of the lessee to the duration of the lease, while it attaches to ownership of the reversion in fee the legal consequences of possession. Such reversion, not being owned by Central at the time its petition for reorganization was filed, is in legal contemplation not now in possession of the bankruptcy court; and, since the law attributes to its mere ownership the legal consequences of possession, the bankruptcy court has no jurisdiction in rem of said reversionary interest." (Printed Opinion, pages 9-10.)

The utter difference between the majority and minority opinions below is this: The majority opinion treated the res as the "incorporeal reversionary interest of the (its) lessor, which arose by operation of law when the leasehold was carved out of the fee simple title"—(Opinion, page 9)—the lessor's title which added to the leasehold estate constituted the entire fee simple title. That is the res which the Commission had authorized the Debtor in

the plan to acquire if it could; that is the res for which the Debtor was authorized to make to the South Western an offer. The minority opinion treated the res as "the reorganization proceeding, including its controversies and questions and the plan it was instituted to bring about" (Opinion, page 20).

We most respectfully submit that the history of the res exception demonstrates the correctness of the opinion of the majority below. When the Courts, in engrafting the res exception upon Section 265, spoke of "a res" in the possession of a Court, they meant "a thing; physical property," and **not** a judicial proceeding.

In the Toucey case, supra, at page 135, the Court recognizes a res as physical property by saying: "Contest between the representatives of two distinct judicial systems over the **same physical property** would give rise to actual physical friction." (Emphasis ours.) And immediately following the language just quoted is: "The rule has become well settled, therefore, that Section 265 does not preclude the use of the injunction by a federal Court to restrain State proceedings seeking to interfere **with property** in the custody of the Court." (Emphasis ours.)

The first of the line of cases cited by the Court in the Toucey case as holding "that the Court, whether Federal or State, which first takes possession of a res withdraws **the property** from the reach of the other" (emphasis ours), is Hagan v. Lucas, 10 Peters 400. There the res was certain slaves. The next is Taylor v. Carryl, 20 Howard 583, where the res was a vessel. Taylor v. Carryl was followed by and in Freeman v. Howe, 24 Howard 450. There the res was certain railroad cars. The Court said:

> "In the case of Taylor et al. v. Carryl (20 Howard 583) the majority of the Court were of the opinion that, according to the course of decision in the case

of conflicting authorities under a State and Federal process, and in order to avoid unseemly collision between them, the question as to which authority should for the time prevail did not depend upon the rights of the respective parties to the property seized, when the one was paramount to the other, **but upon the question, which jurisdiction had first attached by the seizure and custody of the** PROPERTY **under its process.** This principle is equally applicable to the case of **property** attached under mesne process, for the purpose of awaiting the final judgment, as in the case of **property** seized in admiralty, and the proceedings *in rem.*" (At page 451. Emphasis ours, except as to the phrase *in rem.*)

In Kline v. Burke Construction Co., 260 U. S. 226, 43 S. Ct. 79, the Court refused to apply the res exception. Of that case, we said in our brief in the Circuit Court of Appeals:

"The Burke Construction Company brought an action at law against Kline and others in the United States District Court for the Western District of Arkansas. The jurisdiction of that Court was invoked, upon the ground of diversity of citizenship. The action was for a breach of contract, whereby the Construction Company had engaged to pave certain streets in Texarkana, and a trial was had which resulted in a mistrial.

"Subsequently to the commencement of the foregoing action, Kline and others instituted a suit in equity against Burke Construction Company in a State Chancery Court of the State of Arkansas, upon the same contract, joining as defendants the sureties on the bond which Burke Construction Company had given for faithful performance of the contract. The bill in the latter suit alleged that the Construction

Company had abandoned its contract and judgment was sought against the sureties as well as against the Burke Company. In the action brought by the Burke Company, Kline and others filed an answer and cross complaint. In the equity suit, Burke filed an answer and cross complaint. Thus the two cases presented substantially the same issues, the only difference being that resulting from the addition of the sureties as parties defendant in the equity suit. Both actions were in personam. The equity suit was removed to the United States Court upon the petition of the Burke Company on the ground of diversity of citizenship and upon the further ground that the question involved was a Federal question. Kline and others moved to remand. The District Court sustained the motion, and the equity suit was thereupon remanded to the State Court.

"After a mistrial of the action at law in the United States Court, the Burke Company filed a bill of complaint as a dependent bill to its action at law, by which it sought to enjoin Kline and others from further prosecuting the suit in equity in the State Chancery Court.

"The United States District Court denied the injunction and an appeal was taken to the Circuit Court of Appeals for the Eighth Circuit. That Court reversed the decision of the District Court and remanded the case with instructions to issue an injunction against the prosecution of the suit in equity in the State Court. From that decree, the case came to the Supreme Court upon writ of certiorari. The Supreme Court reversed the decree of the Circuit Court of Appeals.

"In other words, the Supreme Court held that the District Court was right in having denied the injunc-

tion. The Supreme Court decided that the District Court was right in refusing to enjoin Kline and others from further prosecuting their suit in the State Court. The reasons which prompted the Supreme Court so to hold are important here. Those reasons are shown at page 235 of the official opinion, page 83 of 43 Supreme Court Reporter, as follows:

"'The well established rule, to which we have referred, that where the action is one in rem, that Court —whether State or Federal—which first acquired the jurisdiction, draws to itself the exclusive authority to control and dispose of the res, involves the conclusion that the rights of the litigants to invoke the jurisdiction of the respective Courts are of equal rank . . . The rank and authority of the Courts are equal, but both Courts cannot possess or control the same thing at the same time, and any attempt to do so would result in unseemly conflict. The rule, therefore, that the Court first acquiring jurisdiction, shall proceed without interference from a Court of the other jurisdiction is a rule of right and of law based upon necessity, and where the necessity, actual or potential, does not exist, the rule does not apply. Since that necessity does exist in actions in rem, and does not in actions in personam, involving question of personal liability only, the rule applies in the former, but does not apply in the latter.'

"Let us apply that language to the facts of the case at bar.

"There is no res in the possession of either Court (except as the lease may give possession). The action in the State Court was not an action in rem. It was purely an action in personam. While the petition in the State Court action did not seek any money judgment in personam, against the officers and Direc-

tors of the South Western, it did seek a decree which would control their personal and official actions. The res—the physical properties of the South Western Rail Road—were not and are not in the possession or control of either Court, State or Federal.

"The question which remained to be adjudicated after the stockholders' meeting of March 28 had been held, was simply this: Have the officers and Directors of the South Western Rail Road the right to sell its properties upon a mere majority vote of its stockholders? The action was one in personam, and not one in rem, and no necessity, actual or potential, exists which requires the application of an injunction by a Federal Court to protect any res in its possession or control. Neither the South Western Rail Road Company, nor its officers, nor its Directors, nor its stockholders, are in the possession or control of the District Court of the United States for the Southern District of Georgia."

In Farmers Loan & Trust Company v. Lake Street Elevated R. Co., 177 U. S. 51, the res was the property of The Lake Street Elevated Railroad Company. There were two conflicting mortgage foreclosures as to this physical property.

In Lion Bonding and Surety Company v. Karatz, 262 U. S. 77, 43 S. Ct. 480, the res was the property of Lion Bonding and Surety Company. In the opinion in the Toucey case, supra, the Court referred to pages 88 and 89 of this opinion. The language there is:

"Where a Court of competent jurisdiction has, by appropriate proceedings, **taken property into its possesion** through its officers, the property is thereby withdrawn from the jurisdiction of all other Courts. Wabash Railroad v. Adelbert College, 208 U. S. 38, 54, 28 Sup. Ct. 182 . . . Compare Oklahoma v. Texas,

> 258 U. S. 574, 581 . . . Possession of the res disables other Courts of coordinate jurisdiction from exercising any power over it. Farmers Loan & Trust Company v. Lake Stret Elevated R. R. Co., 177 U. S. 51, 61 . . . The Court which first acquired jurisdiction through **possession of the property** is vested, where it holds possession, with the power to heat and determine all controversies relating thereto. It has the right, while continuing to exercise its prior jurisdiction, to determine for itself how far it will permit any other Court to interfere with such possession and jurisdiction. Palmer v. Texas, 212 U. S. 118, 126 . . ." (Emphasis ours.)

So in all cases cited by the Court in the opinion in the Toucey case in support of "the res exception" there was tangible physical property in the prior possession of the Court held to have prior jurisdiction.

At page 22 of the opinion in the case at bar, the dissenting Judge stated:

> "He (the District Judge) said, with complete clarity too, that under the controlling decisions of the Supreme Court of the United States, the res of which the Reorganization Court has exclusive jurisdiction is not merely, or even mainly, the physical properties of the debtor railroad. It is the **proceeding for its reorganization**, including all claims, issues and controversies affecting or relating to **the plan of reorganization, the prime res in the proceeding**, its formulation, acceptance and carrying out."

The Court, in its majority opinion, did not, as we read its opinion, hold that the res was "the physical properties of the debtor railroad." The physical properties which the plan authorized the debtor railroad to acquire, if it could, were those of the South Western Rail Road. As

we read the majority opinion, it decided the res to be "the incorporeal reversionary interest of the (its) lessor, which arose by operation of law when the leasehold was carved out of the fee-simple title" (Opinion, page 9). It decided the res to be the reversionary interest necessary to be acquired by the debtor in order for the debtor to acquire legally the full fee-simple title to properties leased to the debtor by the South Western Rail Road. This reversionary interest was not in the possession of the Bankruptcy Court. The fee-simple title to the properties of the South Western was not in the possession of the Bankruptcy Court. The physical properties of the South Western were not in the possession of the Bankruptcy Court except in so far as the lease gave it possession. The Bankruptcy Court had possession of a leasehold interest in the properties, **not** the properties; **not** the fee-simple title to the properties; **not** the reversionary interest in the properties which, plus the leasehold, makes up the fee-simple title. We respectfully submit that the dissenting opinion totally overlooks the fact that "the res exception" is based on the prior possession by the Federal Court of physical property.

In footnote 5 of the dissenting opinion, there are cited as the "controlling decisions" of the Supreme Court of the United States referred to in the first clause of the quotation last made from the dissenting opinion, the following:

Continental Bank & Trust Company v. Rock Island, 294 U. S. 648;
Thompson v. Texas Mexican Ry. Co., 328 U. S. 134;
Smith v. Hoboken Ry. Co., 328 U. S. 123; and
Gardner v. New Jersey, 329 U. S. 565.

With respect to Continental Illinois National Bank and Trust Company v. Chicago, Rock Island & Pacific Railway Company, 294 U. S. 648, we said in our brief below:

A mere reading of the facts of this case shows the difference between it and the case at bar. **There,** the debtor had outstanding collateral notes secured by mortgage bonds, a part of which were issued by it, part by a corporation forming a part of the system. The holders of the collateral notes were about to sell them. Those having interests adverse to the holders of these collateral notes set forth facts showing that unless the sale of the collateral was enjoined, it would be impossible to prepare and secure approval of a plan of reorganization. No plan of reorganization had been prepared. The bonds, which were about to be sold were the property of the debtor, and therefore a part of the res in the hands of the Bankruptcy Court. An injunction, enjoining the sale, was granted by the Bankruptcy Court. The grant of the injunction was affirmed because "The power to issue an injunction when necessary to prevent the defeat or impairment of its jurisdiction is, therefore, inherent in a Court of Bankruptcy as it is in a duly established Court of Equity" (294 U. S., at page 675).

The Court stated, at page 676, "An injunction may be issued in such circumstances for the purpose of protecting and preserving the jurisdiction of the Court until the object of the suit is accomplished and complete justice done between the parties."

The gist of the decision is shown at page 678, in the following language:

> "It is evident that the effect here wrought by the menace of impending sales of the collateral would seriously embarrass and probably prevent the formulation and consummation of a plan of reorganization."

That "gist" shows the utter difference between that case and the case at bar. There, no plan of reorganization

had ever been formulated. The properties about to be sold by the collateral note holders was property in the hands of the Trustee, and therefore in the hands of the Court. The use of that property was necessary in the formulation and consummation of the plan of reorganization.

> "The sale of the collateral securities from time to time during the progress of this consideration and work well might require such changes of detail in the plan, entailing new and perhaps difficult reconcilements of views among many and conflicting interests, as to force an abandonment of the proceeding."

How different is our case. The plan had been formulated, approved by the Commission and by the District Court. The plan recognized that the debtor might not acquire the South Western. The plan says to the debtor "Acquire it if you can on terms most advantageous to you, but the method of acquisition is left to the Trustee." The question of how it can be acquired in no way defeats or impairs the jurisdiction of the Bankruptcy Court.

With respect to Thompson v. Texas Mexican Ry. Co., 328 U. S. 134, we said:

There, "Tex-Mex" sued Thompson, Trustee for "Brownsville Railroad" (St. Louis, Brownsville and Mexico Railway Company) in a Texas State Court to enjoin Brownsville and its Trustee from using certain trackage which it had been using under contract, and to recover damages for the use. The State Courts held that the trackage contract had been terminated, and awarded Tex-Mex large damages. The Supreme Court granted certiorari and reversed.

In reviewing the Supreme Court, at page 142 of the official report, alluded to Smith v. Hoboken, decided the same day, said:

"We think that the same considerations are applicable to a determination that the trackage agreement in this case should be terminated pending formulation of a reorganization plan. By Section 77, sub. b, 'the plan of reorganization may adopt or reject executory contracts of the debtor as well as unexpired leases. And the adoption of either an executory contract or of a lease by the Trustee does not preclude a rejection of it in the plan. Moreover, trackage agreements like leases of railroad tracks and facilities are means by which railroad systems have been assembled. The retention or the sloughing off of trackage agreements may assume importance in the fashioning of a plan of reorganization by the Commission. The problem is kin to that involved in Continental Illinois National Bank and Trust Company v. Chicago, Rock Island and P. Ry. Co., 294 U. S. 648, 55 S. Ct. 595, 79 L. Ed. 1110. In that case the Court sustained the power of the reorganization Court to enjoin under Section 77 creditors, who held collateral notes of the debtor railroad secured by its bonds and bonds of its subsidiaries, from selling the collateral under a power of sale in the notes, where the sale would so hinder, obstruct, or delay the plan of reorganization as would likely defeat it. The Court stated, 294 U. S. at pages 676, 679, 55 S. Ct., at page 606, that a proceeding under Section 77 is a 'special proceeding which seeks only to bring about a reorganization, if a satisfactory plan to that end can be devised. And to prevent the attainment of that object is to defeat the very end the accomplishment of which was the sole aim of the section, and thereby to render its provisions futile.' The Court concluded, in view of the complexity of the problems involved in the reorganization, 'that without the maintenance of the status quo for a reasonable length of time no satisfactory plan could be worked out.'"

And further, on pages 142 and 144:

"We think like reasons make it important that the status quo of this trackage agreement be maintained pending decision by the Commission as to the proper treatment of it in the reorganization plan. The Commission may decide that it should be adopted. Or the Commission may conclude that the trackage agreement should be rejected or that its termination pursuant to its terms should be allowed. These matters involve not only the interest of the two parties to the trackage agreement but phases of the public interest as well.

"A Court which enforced the termination clause of the agreement pursuant to its terms would be narrowing the choice of the Commission and perhaps embarrassing it in the performance of the functions with which it has been entrusted. For these and like reasons which we have discussed in Smith v. Hoboken Railroad, W. & S. C. Co., supra, we think the Court erred in holding that the trackage agreement has been or should be terminated."

And the Court concluded, page 151:

"Thus, however the case may be viewed, the Court below should have stayed its hand and remitted the parties to the Commission for a determination of the administrative phases of the questions involved. Until that determination is had, it cannot be known with certainty what issues for judicial decision will emerge. Until that time, judicial action is premature. The judgment will be reversed and the cause remanded so that the case may be held pending the conclusion of appropriate administrative proceedings."

The "appropriate administrative proceedings" in our case are concluded.

The Commission and the District Court had remitted to any competent Court for a decision the question whether the properties of South Western might be legally acquired, and, if so, by the exercise of what quantity or quality of corporate authority.

Is there any better forum for the determination of these questions of Georgia law than the Georgia State Courts?

And regarding Smith v. Hoboken Ry. Co., 328 U. S. 123, we said:

Hoboken Manufacturers' Railroad Company (the debtor) operated a terminal switching railroad at Hoboken, New Jersey. The major part of its right of way and line of railroad was leased by it from Hoboken R. R. Warehouse and S. S. Connecting Company. The debtor (lessee) was in reorganization. Smith was its Trustee. The lessor moved the reorganization Court to terminate the lease. The Court granted the order, holding that the appointment of the Trustee was a breach of the terms of the lease, entitling the lessor to re-enter. The Circuit Court of Appeals affirmed (150 Federal [2d] 921). The Supreme Court reversed. The basis of the reversal is shown in division four of the opinion (page 951 of 66 Supreme Court):

> "But the question remains whether enforcement of the forfeiture clause would be consistent with the provisions of Section 77 (of the Bankruptcy Act) within the meaning of Section 77, sub. L. That question does not seem to have been considered by the lower Courts. Our view is that it presents problems primarily for consideration and decision by the Interstate Commerce Commission and that the reorganization Court should not have declared a forfeiture of the lease **until the questions had been passed upon by the Commission.**" (Emphasis ours.)

The Commission there had not yet approved or formulated a plan of reorganization. The Court called attention to that fact, and, after reviewing the necessity of the status quo being maintained until the Commission could formulate or approve a plan of reorganization, said:

> "The point is, that if the reorganization Court decreed a forfeiture **in advance of consideration of the problem by the Commission** it interferes with the functions entrusted to the Commission under Section 77. * * * If forfeiture of leases can be decreed **without prior reference of the matter to the Commission, it may be seriously embarrassed in preparing the plan which it deems necessary or desirable for the reorganization of the debtor.** * * * We hold that the District Court erred in declaring the lease forfeited and that the judgment should be reversed and the cause remanded. The District Court should stay its hand **pending a decision by the Interstate Commerce Commission on the question.**" (Page 953 of 66 Supreme Court.) (Emphasis ours.)

The emphasized portion of the foregoing quotation demonstrates the utter inapplicability of that case to our case.

In that case the reorganization Court declared a lease forfeited before the Commission could pass upon the import of the lease in the formulation of a plan of reorganization. The Supreme Court simply instructed the Reorganization Court to "stay its hand" until the Commission could pass upon the question at issue in connection with a plan.

In our case the Commission has acted. The Commission has said to the Trustee: Acquire the South Western's properties if you can. If you cannot, its lease stands disaffirmed.

In our case the Commission has considered the problem. It has approved a plan. There remains no question for consideration by the Commission.

The dissenting opinion deals with Gardner v. New Jersey, 329 U. S. 565, again at page 23, and quotes from it as follows:

> "The reorganization Court has jurisdiction over **all property of the debtor**, including that on which the State asserts a lien, and can adjudicate all questions and issues raised by objections to the State's claim, including the validity and priority of liens, whether or not claimed by the State." (Emphasis ours.)

We emphasized the words "all property of the debtor" in the foregoing quotation for, we think, it illustrates what is, with all respect, one of the fallacies in the dissenting opinion. The subject matter of our suit in the State Court was not "property of the debtor". It was property of a solvent corporation, not in bankruptcy, for which the debtor corporation had been authorized to make an offer. The question in our case in the State Court was: By what quantity or quality of corporate authority might that offer by the debtor be legally accepted? Neither were we, in our case in the State Court, seeking to have adjudicated any question as to the validity and priority of liens.

Further, in the dissenting opinion (page 24), is an additional quotation from Gardner v. New Jersey, 329 U. S., at page 577. We do not have the official volume, 329, but in Supreme Court Reporter advance sheet, February 1, 1947 (67 S. Ct., at page 473), immediately preceding the language quoted on page 24 (R., ...) of the dissenting opinion, is this:

"If the reorganization Court lacked the power to deal with tax liens of a State, the assertion by a State of a lien would pull out chunks of an estate from the reorganization Court and transfer a part of the struggle over the corpus into tax bureaus and other State tribunals. That would not only seriously impair the power of the Court to administer the estate and adversely affect the power of the Interstate Commerce Commission and the Court to promulgate a reorganization plan."

Then are cited Smith v. Hoboken R. R. &c. Co., supra, and Ecker v. Western Pacific R. Corp., 317 U. S. 448, 466-475, 63 S. Ct., 692, 704-708.

We have previously discussed Smith v. Hoboken R. R. &c. Company, and shown that in the situation there considered by the Court, the Commission had not yet formulated a plan. In the case at bar, it has. It has said to the debtor "acquire, if they can be acquired on the terms hereinafter set forth properties at present leased to the debtor by the South Western Railroad. * * * If any of these properties shall not be acquired * * * then, and in that event, the lease * * * of any line * * * not so acquired * * * shall be disaffirmed * * *" (R., pages 138-39).

(We find nothing in the Ecker case which militates against our position here.)

And almost immediately following the language quoted on page 4 of the dissenting opinion is this:

"We hold that the reorganization Court has jurisdiction over **all the property of the debtor** including that on which New Jersey asserts a lien and that the power of the Court to deal with liens extends to the lien which New Jersey claims" (64 S. Ct., at page 474). (Emphasis ours.)

Here was simply an application of "the res exception," though the lien claimant was a State. Here the Court was dealing with a case in which a State asserted a lien against "property of the debtor" in the possession of the reorganization Court. Those statements alone would suffice to demonstrate the inapplicability of the Gardner case here. But further in the opinion the Court used language which we think is favorable to our contentions here. At pages 476 and 477 of 67 Supreme Court Reporter, the Court said

> "This controversy is now in a different posture. New questions of local law emerge—whether Wilentz v. Hendrickson, supra, controls this case; whether a valid settlement can be made under an unconstitutional act and, if so, whether this alleged compromise was valid and effective; whether, if the settlement was not binding, the amount of the claim or the extent of the lien has been altered by the payments made during reorganization or by the conduct of the parties.
>
> "These points have been briefed and argued here. The difficulty is that neither the reorganization court nor the Circuit Court of Appeals passed on them. The reorganization court passed solely on a question of jurisdiction—whether it had the power to make adjudication concerning the amount of New Jersey's claim which should be allowed and the validity and extent of her lien, or whether New Jersey's sovereign immunity stood in the way of such determinations. And the Circuit Court of Appeals did not pass on these questions because it, too, was concerned solely with the question of jurisdiction.
>
> "(20) These issues bristle with questions of New Jersey law on which we should not pass, even if we were to assume that they are properly here, without the benefit of the views of judges who sit there and

have a greater familiarity with local law and local practices than we. See Huddleston v. Dwyer, 322 U. S. 232, 237, 64 S. Ct. 1015, 1018, 88 L. Ed. 1246; Brillhart v. Excess Insurance Co., 316 U. S. 491, 497, 62 S. Ct. 1173, 1176, 86 L. Ed. 1620; City of Hammond v. Schappi Bus Line, 275 U. S. 164, 169, 48 S. Ct. 66, 68, 72 L. Ed. 218; Wilson Cypress Co. v. Del Pozo Y Marcos, 236 U. S. 635, 657, 35 S. Ct. 446, 454, 59 L. Ed. 758. And for a review of the earlier cases, see dissenting opinion of Mr. Justice Brandeis in Railroad Commission of California v. Los Angeles R. Co., 280 U. S. 145, 164, 165, 50 S. Ct. 71, 76, 77, 74 L. Ed. 234. Moreover, we are now advised that there is presently pending before the Circuit Court of Appeals an appeal by the Attorney General of New Jersey from an order of the reorganization court denying leave to join the trustee as party defendant in a suit in the New Jersey Court to determine whether there was a valid settlement of the tax claims and to stay further determination of that controversy in the federal court until the state courts have passed on the question. If the Circuit Court of Appeals orders the application granted, cf. Thompson v. Magnolia Petroleum Co., 309 U. S. 478, 483, 60 S. Ct. 628, 630, 84 L. Ed. 876; Ex parte Baldwin, supra, 291 U. S., p. 619, 54 S. Ct. 555, 78 L. Ed. 1020, the state law phases of the controversy will be authoritatively settled. If the other course is followed, the issues can be resolved by the reorganization court on a record more adequate than the present one for purposes of review. Whatever procedure is followed it is more fitting that those more versed than we in the intricacies and niceties of New Jersey law first pass on these questions."

The Gardner case, supra, was decided by the Court January 20, 1947.

Subsequently, the Circuit Court of Appeals decided In re. Central R. of New Jersey, 163 Fed. (2d) 44 (July 15, 1947), the seventh headnote of which is as follows:

> "Where Circuit Court of Appeals and bankruptcy court could only guess as to what decision of New Jersey Court of Chancery would be as to existence of contract between debtor railroad and state of New Jersey regarding payment of taxes notwithstanding unconstitutionality of New Jersey acts which provided for settlement of railroad taxes, and only by reference to state court could problem be solved, and controversy was peculiarly justiciable in state court, denying state's request to have contract question determined in state court was error. P. L. N. J. 1941, page 768, as amended by P. L. 1942, page 651; Bankr. Act, Section 27, 11 U. S. C. A., Section 50."

This Court was asked to grant the writ of certiorari to review the questions decided there. The petition was denied on October 27, 1947 (68 S. Ct. 112-13).

Finally, on this phase, this Court said in Mandeville et al. v. Canterbury, 318 U. S. 47, 48-49, 63 Sup. Ct. Rep. 472, 473:

> "Section 265 of the Judicial Code, 28 U. S. C. A., Section 379, 28 U. S. C. A., Section 379, provides that except as authorized by any law relating to proceedings in bankruptcy 'the writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a State.' To this sweeping command there is a long recognized exception that if two suits pending, one in a state and the other in a federal court, are in rem or quasi in rem, so that the court or its officer must have possession or control of the property which is the subject matter of the suits in order to proceed with the cause and to grant

the relief sought, the court first acquiring jurisdiction or assuming control of such property is entitled to maintain and exercise its jurisdiction to the exclusion of the other.

"In such cases this Court has uniformly held that a federal court may protect its jurisdiction thus acquired by restraining the parties from prosecuting a like suit in a state court notwithstanding the prohibition of Section 265. This exception to the prohibition has been regarded as one of necessity to prevent unseemly conflicts between the federal and state courts and to prevent the impasse which would arise if the federal court were unable to maintain its possession and control of the property, which are indispensable to the exercise of the jurisdiction it has assumed. (But where the judgment sought is strictly in personam for the recovery of money **or for an injunction compelling or restraining action by the defendant**, both a state court and a federal court having concurrent jurisdiction may proceed with the litigation at least until judgment is obtained in one court, which may be set up as res judicata in the other. These principles were recognized and the authorities sustaining them collected in Penn General Casualty Co. v. Pennsylvania, 294 U. S. 189, 55 S. Ct. 386, 79 L. Ed. 850, and Toucey v. New York Life Ins. Co., 314 U. S. 118, 134-36, 62 S. Ct. 139, 144, 145, 86 L. Ed. 100, 137 A. L. R. 967)." (Emphasis ours.)

Was the injunction sought and granted by the Federal Court authorized by any law relating to proceedings in bankruptcy?

The exclusive jurisdiction of the Bankruptcy Court in reorganization proceedings is that which Bankruptcy Courts have customarily possessed.

Meyer v. Fleming, 327 U. S., 66 Sup. Ct. 382.

After citing that case, the majority opinion of the Circuit Court of Appeals states (Opinion, page 4):

> "In entering the judgment in this case, annulling and staying proceedings in the State Court, the Bankruptcy Court undertook in a summary proceeding to exercise exclusive jurisdiction in rem as to property that the Trustee did not own, but was seeking to acquire. The proceeding in the State Court that was enjoined, and the injunction that was annulled, were strictly in personam. It does not appear from this record that the Bankruptcy Court had any jurisdiction whatever of that controversy; but, conceding that it did, such jurisdiction was concurrent, not exclusive, and should not have been exercised in a summary proceeding."

The jurisdiction which Bankruptcy Courts have customarily possessed is thus stated in Title 28, U. S. C. A., Section 379, Note 28, page 232:

> "By this Section (255 of the Judicial Code) and Section 29 of Title 11, Bankruptcy, the Bankruptcy Court is especially authorized to issue injunctions against the parties and stay proceedings in the State Courts **when necessary for the exercise of its jurisdiction.**" (Emphasis ours.)

It was not necessary for the District Court to have enjoined the action in the State Court in order that it might exercise its jurisdiction. It had none. It has none.

What was the situation on March 25, 1947, when Benton instituted his action in the State Court against South Western Rail Road Company, its officers and directors—not against the Trustee.

The Interstate Commerce Commission had approved a plan of reorganization for the Central of Georgia Railway

Company which simply authorized that debtor to make an offer for the properties of South Western. The exact language in that respect is shown in the record (pages 138, 139). The plan was approved by the District Court Judge in an opinion and order dated June 24, 1946. The plan had not provided that the properties might be acquired by a simple majority vote of the stockholders of the Company. Neither did the opinion and order of the District Court of June 24, 1946. He simply said: "If the lessors do not accept the proposal to acquire their lines, they are, on disaffirmance, at liberty to take their properties back" (R., page 112). He did not attempt to adjudicate the method of acceptance, the nature of the corporate action necessary to constitute an acceptance. There were no proceedings pending before him in which such questions could have been decided. Whether the properties of the South Western could be acquired by the debtor or the reorganized Company on the terms set forth in the plan was left by the Commission and by the Bankruptcy Court in its order of June 24, 1946, to the stockholders of the Company to decide. Whether such acceptance on the part of the Company could be based on a vote of the majority of the outstanding stock of the Company was a question as to which Benton and other stockholders, on the one hand, and the officers and certain of the directors, on the other hand, differed. That difference was placed before the Superior Court of Bibb County, by respondent, Benton, by his action of March 25, 1947, for decision at a time when the District Court had no proceedings before it in which that question could have been determined, even if the Bankruptcy Court would have had any jurisdiction to decide it on the petition of anyone. The Trustee was not a party to the State Court proceeding so instituted. Neither was the Central of Georgia Railway Company. The proceeding in the State Court would not have had the effect of defeating or im-

pairing the jurisdiction of the District Court in the reorganization proceedings.

On the contrary, the proceedings in the State Court would give to the Commission an authoritative answer, under the laws of Georgia, to the question whether or not the lessor, South Western, had legally accepted "the proposal to acquire its lines."

The answer to that question was being determined in an orderly manner in a proper forum, in proceedings between South Western and its stockholders, when the Trustee, not a party to the case, filed the injunction proceedings in the State Court.

This status seems to us to have been misconceived in the minority opinion, wherein (Opinion, page 16) it is said:

> "The opinion of the majority in stating the case as though the State Court jurisdiction had first attached, the State Court injunction had been first issued, that is as though it were the United States Judge, and not the State Judge, who had been guilty of a gross breach of comity (a) here, and in failing to state that the State Court injunction was issued to stay action in the Reorganization proceeding after and in defiance of the issuance of the Federal Court injunction, puts the Federal District Judge in the invidious position in which the facts place the State Court judge" [(a) citing, among others, Bryan v. Speakman, 53 Fed. (2d), at 465].

This statement seems to assume that upon the filing of the petition for reorganization by the Central of Georgia in 1940, and the later promulgation of the plan, the Bankruptcy Court was vested with exclusive jurisdiction over the internal affairs of South Western Rail Road Company, a solvent Georgia corporation, simply because it had

leased its properties to the bankrupt corporation. For, in the absence of such assumption, the State Court jurisdiction "had first attached" as to the subject matter of the suit therein instituted. The very case of Bryan v. Speakman, supra, so demonstrates. We assume that in the reference to page 465 of this opinion the allusion is to the following language:

> "By the great weight of authority, it has always been the law that the rule which operates to prevent unseemly conflicts between State and Federal Equity Courts, that that which first acquires jurisdiction of a res retains possession of it . . . has governed the relation between State Courts and Courts of Bankruptcy. . . ."

That case involved a contest between a State Court Receiver and a Bankruptcy Trustee. The chronology is shown at page 464:

July 29, 1930: Mortgage Trustee presented to Superior Court Judge bill for foreclosure, appointment of receiver, and injunction.

July 29, 1930: Petition read, sanctioned, and ordered filed. Process issued. Hearing on receivership application was by the Court postponed to September 15, with right of acceleration upon twenty-four hours notice.

July 30, 1930: Bill served.

September 5, 1930: Appellee appointed Receiver by U. S. District Court of Delaware.

September 10, 1930: Appellee appointed Ancillary Receiver by U. S. District Court (Ga.).

September 15, 1930: Appellant appointed Receiver by State Court, and on

October 3, 1930: Filed petition in U. S. Court for turning over of property to him, which was denied.

In reversing, Judge Hutcheson, speaking for the Circuit Court of Appeals, said [53 Fed. (2d) at page 466]:

> "In Reisner v. G. C. & S. P. Ry. Co., 89 Texas 656 . . . in a thoroughly and well reasoned opinion reversing the then state of the law, the Supreme Court of Texas held: 'Whenever the Judge of a Court has acted upon the application in such way as to indicate that he has determined that he will investigate the matter, and may appoint a Receiver at some future date, the property is thereafter considered in the custody of the law, and not liable to the process of any other Court pending such investigation. . . . May v. Printup, 59 Ga. 128.' . . ."

Here, the State Court Judge acted upon the petition for injunction on March 25, 1947, by sanctioning it and issuing a rule nisi thereon, returnable March 26. This would, in itself, have been sufficient to indicate that he would investigate the matter, and that he might grant the interlocutory injunction. But a further step was taken in the State Court. The South Western Rail Road Company and certain of the individual defendants responded to the rule nisi, and a hearing was held on March 26 and 27, 1947, at the conclusion of which the State Court Judge reserved his decision as to whether or not he would grant the injunction. This was the status of the State Court suit when, on April 18, 1947, upon the petition of the Trustee, a stranger to the State Court suit, the Federal Judge (of the Bankruptcy Court) issued an order restraining Benton from prosecuting his State Court suit. It was in this status that, on April 24, 1937, the Judge of the State Court, of his own motion, issued an interlocutory injunction against the defendants in the State Court suit (R., pages 246-249).

In one of the opening sentences thereof the dissenting opinion seems to overlook the fact that, with respect to

the question of the validity of an acceptance of the offer with respect to the question of whether the properties of South Western could legally be conveyed to and acquired by the debtor by a mere majority vote of the stockholders of South Western, the State Court first acted under the circumstances stated in the preceding paragraph. The dissenting opinion states (page 15 thereof):

> "In determining this ultimate question, three primary questions must be answered. The first one is: 'After the minority stockholders have been enjoined by the Reorganization Court from proceeding with their injunction suit, can a State Court Judge, of his own motion, issue the injunction as prayed, staying the whole reorganization proceedings as to the leased railroad until the controversy between the minority stockholders and the Company over the necessity for unanimous stockholders' consent has been determined by the State Court?' "

This question overlooks the salient fact that **before** the minority stockholders had been enjoined by the Reorganizing Court from proceeding with their injunction suit, the State Court Judge had not only formally taken jurisdiction thereof, but had conducted a hearing thereon. The State Court Judge is in just as strong a position here as was the Federal Court Judge in Farmers Loan and Trust Company v. Lake Street Elevated Railroad Co., 177 U. S. 51.

We respectfully suggest that the same oversight appears in the italicized statement at the beginning of the dissenting opinion.

In concluding this phase of the brief, we again state that the respondents have never asked the State Court to set aside the plan of the Commission. Nor have they asked

that the order of the Bankruptcy Court below, approving it, be reversed. Full effect has been given to the language of the plan. We simply say that the debtor cannot acquire the properties of South Western on the terms, for the price, set out in the plan by an acceptance of the offer of the Trustee, when that acceptance is authorized by a mere majority vote of the stockholders.

And, in support of our position as just stated, we cite Central New England Ry. Co. v. Boston and Albany R. Co., 279 U. S. 415, and more especially the language of the Court at page 421:

> "Here, respondent does not ask that the order be set aside or that it be regarded as illegal and void; it insists only that the order did not purport to deal with the contract between the carriers, and so cannot have the effect, attributed to it by petitioner, of annulling the contract. The question is merely one of the legal effect of the order. Neither party contests its validity or asks that the carrier be compelled to do anything inconsistent with its terms."

CASES CITED IN BRIEF IN SUPPORT OF THE PETITION.

A great many of the cases cited in the brief in support of the petition have been treated by us previously in this brief, and no further reference need be made to them.

There are others which should be considered.

At pages 13-14 of the brief in support of the petition, it is stated:

> **"The Commission has full power to authorize a purchase, merger, or consolidation on the vote of a ma-**

jority of the stock unless a different vote is required under applicable State laws, in which case the number so required shall assent.

"Section 5 (11) of the Interstate Commerce Act makes this provision in terms.

"The statute law of Georgia is contained in Code Sections 94-328, 94-329, 94-311 and 94-318 (copied in Appendix No. 2). Under these Statutes all that is required is the vote of a majority of the stock. Code Sections 94-311 and 94-318 do not specify the vote necessary but it has been decided that a majority vote is sufficient.

Dady v. Georgia & Alabama R. Co., 112 Fed. 838.

"Code Sections 94-311 and 94-318 are part of the General Railroad Laws of Georgia under which the Debtor is incorporated. Power given under these latter Code sections confers power on both corporations to consolidate or sell.

Theis v. Spokane Falls Gas Light Co., 49 Wash. 477, 95 Pac. 1079, 1080.

"There is no other applicable State Law on the subject in Georgia.

"We think Section 5 (11) is referring to Statute Law, and if there is no different Statutory law in the State, the majority rule of the Federal Statute must prevail.

"The Commission would not be bound to follow a decision of the Georgia Court, that unanimous stockholder consent is necessary, because this would nullify altogether the power of the Commission in the premises. Morever, this would be wholly inconsistent with the other provisions of Section 5 (11)."

There are at least three answers to this contention:

1. The Commission in the plan did not authorize a purchase, merger, or consolidation on the vote of the majority of the stock or on any other vote. The plan simply authorized the debtor to acquire the properties of the South Western on the terms therein stated.

2. While Code Sections 94-311 and 94-318 are part of the General Railroad Laws of Georgia, under which the **debtor** was incorporated, they are **not** a part of the law under which South Western was incorporated, and therefore do not apply to it. These sections were codified from the General Railroad Incorporation Act, enacted by the General Assembly of Georgia in 1892. South Western was incorporated by a special Act of the General Assembly enacted in 1845, and has never become amenable to the General Railroad Incorporation Act.

3. This very distinction was recognized in Dady v. Georgia & Alabama R. Co., 112 Fed. 838, at page 842-843 of Judge Speer's opinion, from which we quote:

> "There are several grounds upon which complainants insist that they are entitled to relief. **The first is that it requires the unanimous consent of the stockholders of the Georgia & Alabama Railway before the complainants can be permitted to consolidate or merge that company with the Seaboard Air of the Florida Central & Peninsular.** In support of this proposition they cite the case of Alexander v. Railroad Co., decided by the Supreme Court of the State of Georgia, and reported in 33 S. E. 866. There the defendant company was enjoined from building a belt line railroad, when it had no authority in its charter to do so. **The Court held in that case that 'proper corporate action' was nothing less than the unanimous consent**

of every stockholder. There, however, the defendant company was not chartered under the general railroad law of the state; and the Court in that case held that, if the road had been under that general law, the company could indefinitely extend its railroad, build branch roads from any points on its line, consolidate with any other railroad company, or lease the property thereof, if not a competing line, build and operate steamboats, etc. 'Certainly,' the Court continues, 'the original incorporators of the West Point Company would never have recognized as their own the simple charter they obtained, after such additions as these, and numerous others that might be mentioned, had been added to it.' **In other words, the supreme court of the state seems carefully to distinguish a case like that before them and a case like that before the court;** for here the Georgia & Alabama Railway is chartered under this general law, and the court adds that the provisions of the general railroad law constitutes the whole or a portion of the railroad charter." (Emphasis ours.)

Dady et al, v. Georgia & Alabama Railway Company et al., 112 Fed., pages 842-43.

In the case **now** before the Court, the Court is not dealing with a corporation chartered under the general law as was the Georgia & Alabama Railway in the Dady case, but **is** dealing with a railroad company not chartered under the general railroad law of the State, as was the Atlanta and West Point in the Alexander case.

Instead of being authority against us, the Dady case is authority for the position we are taking.

At page 18 of the brief in support of the petition, it is stated: "The Commission has decided that it is in the

public interest that the reorganized Company should acquire the railroad properties of South Western, because it is an integral and important part of the system of the Central."

We respectfully differ with this statement, and assert that the Commission decided no such thing. Again we repeat, in part, what the Commission did say:

> "Prior to or upon consummation of the plan, the debtor shall also acquire, **if they can be acquired on the terms** hereinafter set forth, properties at present leased to the debtor by the South Western Rail Road . . . . **If any of these properties should not be acquired** . . . . then and in that event the lease or leases of any line . . . . not so acquired, shall be disaffirmed . . . ." (R., pages 138-139). (Emphasis ours.)

The plan simply authorized or directed the debtor to acquire the South Western if it could, and, if it could not, made provision for a disaffirmance of the lease.

With respect to this the majority opinion (page 6) of the Circuit Court of Appeals pointed out:

> "In the instant case, the plan assumes that the fee of the leased lines will be acquired by the acceptance of the plan, and provides that, if not accepted, the lease of any such line shall be disaffirmed. Not only that, but the Act itself looks forward to the contingency of a lease being rejected and of the lessor being unable to operate the line. In this event, the Act provides that it shall be the duty of the lessee to continue to operate the line for account of the lessor until the abandonment of such line be authorized by the Commission [11 U. S. C. A. 305 (c) 6]. There is no danger of the public interest being adversely

affected by rejection of the lease and the inability of the lessor to operate the railroad."

At page 21 of the brief in support of the petition, it is stated:

> "XIV. In the exigencies which confront South Western, it clearly has power under Georgia law to sell its railroad property on the vote of a majority of its stock."

As we read the majority opinion of the Circuit Court of Appeals, it did not pass on this question. The dissenting opinion (page 16) states as what it considered the third question to be: "Was the District Judge right in deciding that unanimous consent of South Western's stockholders was not necessary, that majority consent was sufficient?" The only answer the dissenting opinion makes to that question is in the last few lines thereof, where, without any citation of authority whatsoever, the dissenting Judge stated that the determination of the Federal Court favorable to the acceptance of the plan was right (Opinion, page 25). There was no citation of authority, although the **State Court Judge** had determined this question of State law to the contrary.

We cannot conceive how this question can possibly be before this Court at this stage of the case. Nevertheless, we summarize briefly what we have said about it in the Courts below:

1. The charter of the South Western Rail Road Company, granted by the General Assembly of Georgia, is a contract between the State and the Company, and between the State and the stockholders of the Company.

2. The obligations of that contract cannot be impaired by subsequent legislation (Dartmouth College case, 4 Wheat. 518, 4 L. Ed. 629).

3. Laws which subsist at the time and place of making a contract, enter into and form a part of it as if they were expressly incorporated in the contract. The obligation of a contract is measured by the standard of the laws in force at the time it was entered into. Its performance is to be regulated by the terms and rules which they prescribe (12 American Jurisprudence, page 14, Constitutional Law, Section 386, citing many Supreme Court cases, among others: W. B. Worthen Co. v. Kavanaugh, 295 U. S. 56, 55 Sup. Ct. 55, holding:

> "To know the obligation of a contract, we look to the laws in force at its making" [295 U. S., at page 60].)

4. As the law of Georgia stood in 1845:

> "A railroad corporation cannot, without special authority of statute, alienate its franchise or property acquired under the right of eminent domain, or essential to the performance of its duty to the public, whether by sale, mortgage, or lease."
>
> Singleton v. South Western Railroad, 70 Ga. 464.

5. The Act of 1933 (Code of 1933, Sections 94-328, 94-329, App. to petition, page 6) permitted the South Western **only so far as the State of Georgia was concerned** to alienate its properties. It did not affect the contractual rights of the stockholders under the charter.

> Mayor etc. of Knoxville v. Knoxville & O. R. Co., 22 Fed. 758 (appeal dismissed 136 U. S. 642);
> Alexander v. A. & W. P. R. Co., 108 Ga. 151.

6. The latter case is decisive of the question of State law controlling here, was so held to be by the State Court Judge and it and his decision are binding on the Federal Courts.

> Erie R. Co. v. Tompkins, 304 U. S. 64, 58 Sup. Ct. 817;

Ruhlin et al. v. New York Life Ins. Co., 304 U. S. 202, 58 Sup. Ct. 860;

Fidelity Union Trust Co. et al. v. Field, 311 U. S. 169, 61 Sup. Ct. 176,

holding:

> An intermediate State Court, in declaring and applying the State law, is acting as an organ of the State, and its determination, in absence of more convincing evidence of what State law is, should be followed by a Federal Court in deciding a State question;

Huron Holding Corporation et al. v. Lincoln Mine Operating Company, 312 U. S. 183, 61 Sup. Ct. 513, holding:

> In determining what is the law of a State, Federal Court may look to decisions of lower State Court as well as those of highest Court of State.

7. An analysis of Alexander v. A. & W. P. R. Co., 108 Ga. 151:

(a) The charter of the Atlanta and West Point R. R. Co. consisted of special Acts of the General Assembly of Georgia, enacted prior to the passage of the General Railroad Incorporation Law;

(b) Under its charter, the A. & W. P. had no authority to build a belt railroad from any point on its road to any other railroad;

(c) The General Railroad Incorporation Law was enacted, which provided that any railroad company theretofore created might, when "authorized by proper corporate action", amend its charter so as to acquire the corporate powers embraced in the general law, which included the right to build the branch railroad in question;

(d) The A. & W. P. sought so to amend its charter. This action was authorized only by a majority of the stockholders and not by unanimous consent;

(e) A number of the minority stockholders of A. & W. P. filed an equitable petition to enjoin the building of this belt or branch line as authorized by the amendment to the charter;

(f) The application for the amendment was a "mere nullity" (h. n. 3), having been based on the resolution of a mere majority of the stockholders which was not "proper corporate action" (h. n. 2);

(g) The building of the line was enjoined.

8. The controlling parallel of the Alexander case to the case as decided by the State Court Judge is:

(a) The charter of South Western consisted of special Act of the General Assembly of Georgia enacted prior to the passage of the General Railroad Incorporation Law;

(b) Under this charter, the South Western had no authority to sell its railroad properties (Singleton v. South Western, 70 Ga. 464 [2]);

(c) An Act of the General Assembly of Georgia was enacted in 1933 (Code of 1933, Sections 94-328, 329) which authorized a railroad corporation under certain conditions to sell or lease its property, rights, and franchises upon such terms as may be agreed upon by the Board of Directors and assented to by the holders of a majority of the stock;

(d) South Western seeks to avail itself of this Act, and sell its properties by virtue of a resolution adopted by a mere majority of its stockholders;

(e) Minority stockholders seek to enjoin such sale;

(f) The Act of 1933, not having been accepted by the stockholders as an amendment to the charter of South Western by "proper corporate action," the resolution authorizing the sale is a mere nullity;

(g) The sale of the properties was properly enjoined.

CONCLUSION.

In the absence of a statement of "questions presented" in the petition for certiorari, and the very general nature of the petition for certiorari and the brief in support thereof, our brief in opposition is, perforce, rather general.

We most respectfully submit that either on the basis that this case does not come within any class of cases in which petitions for certiorari are granted or on the basis of the law involved, or on the basis of the failure of the petition to comply with Rule 38 (2), the petition should be denied.

An authorized rule of Court has the force of law.

Weil v. Neary, 278 U. S. 160, 49 Sup. Ct. Rep. 144 (cases cited 278 U. S., at page 169).

"The Court announces its determination to insist upon a strict observance of all rules intended to facilitate the examination of causes, especially those submitted."

School District v. Insurance Co., 101 U. S. 472.

Respectfully submitted,

CHARLES J. BLOCH,
614-18 Persons Building,
Macon, Georgia,
Attorney for Respondents.

and unreliable figures, and seem to totally ignore the fact that the property of this Company is necessary and indispensable to the successful operation of the Central System as a whole" (R., pages 105-6).

At this 1946 meeting the resolution adopted at the 1944 meeting, rejecting the Trustee's offer of purchase of South Western's properties, was unanimously reaffirmed (R., page 106).

On June 25, 1946, the plan was approved by the District Judge (R., pages 48, 105). In his opinion, affirming it, he said:

"If the lessors do not accept the proposal to acquire their lines they are, on disaffirmance, at liberty to take their properties back."

South Western had appeared specially and asked that its lease be adopted by the reorganized company without change (R., page 47). Despite their oft-expressed opinion as to the unfairness of the plan as it affected South Western, and the resolutions of the stockholders disapproving it, its officers and directors took no steps to appeal from the order of the District Judge approving the plan. No appeal was taken (R., pages 107, 48).

On July 6, 1946, a called meeting of the Board of Directors of South Western was held (R., page 106). The President stated that the purpose of the meeting was to discuss the question of the action to be taken by the South Western Board in view of the approval of the Commission's plan of reorganization by the District Court, stating that the Court had approved the plan and directed that the plan be submitted to the creditors for approval. After discussion the Directors decided that it was not necessary for the South Western to take any action until the plan had first been

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OCTOBER TERM, 1948.

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vs.

L. O. BENTON, JR., et al., Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

BRIEF OF COUNSEL FOR THE RESPONDENTS.

CHARLES J. BLOCH,
ELLSWORTH HALL, JR.,
614-18 Persons Building,
Macon, Georgia,
Counsel for the Respondents.

approved by the creditors and put up to South Western for acceptance or rejection (R., page 106).

So it was, therefore, that the Directors did not follow the plan which they had previously decided upon at their meeting of July 28, 1945 (R., pages 104-5), of calling a meeting of stockholders of South Western in the event of the approval of the plan by the District Judge.

On January 25, 1947, a meeting of the Board of Directors of South Western was held. The President stated that the primary purpose of the meeting was to decide what, if any, recommendation the Board would make to the stockholders with reference to either accepting or declining the offer made for the physical assets of South Western. It was decided that the Board would not take any action on the question at that meeting (R., page 107).

On March 13, 1947, there was held the annual meeting of the stockholders of South Western. This was the first meeting of the stockholders held after the approval of the plan by the District Judge. Accompanying each proxy sent to the stockholders prior to that meeting was no letter "setting forth in detail why the Board was recommending to the stockholders that the offer be rejected." There was no letter stating "that it was the intention of the holders of the proxies to vote against the acceptance of the offer" (R., page 105).

At this meeting of stockholders President Wright and the old Board of Directors were re-elected, the President having stated in his report to the stockholders' meeting that immediately following it the Board would take definite action with respect to the Commission's order, and recommend to the stockholders either an acceptance or rejection of the provisions of the plan as they affect the South Western Rail Road, giving its reasons therefor (R., page

108). The report also stated that the stockholders would be promptly advised of the action taken by the Board of Directors upon the Commission's order, and that it was proposed to hold an adjourned meeting of the stockholders on March 28, 1947, at which every stockholder would be given the opportunity to vote either in person or by proxy upon the acceptance or rejection of the provisions of the plan with respect to the purchase by the new Company of the South Western Rail Road (R., page 108).

Upon the adjournment of the stockholders meeting, a meeting of the Board of Directors was held at which a resolution was passed (two Directors absent) by the terms of which the Directors accepted the provisions of the approved plan of re-organization with respect to the acquisition of the South Western Rail Road Company, subject to the assent of said acceptance by the holders of a majority of the South Western Rail Road Company stock (R., pages 108, 116).

So it was, therefore, that although the stockholders had continuously since March, 1944, rejected this offer and although in every affirmative action taken with respect to it by the Directors, they had also rejected the plan, suddenly, on March 13, 1947, the officers and Directors, re-elected earlier that day at a stockholders meeting to which they had given no notice of their change of attitude toward the offer (R., page 108), approved the plan and proposed to submit it to a meeting of the stockholders to be held some fifteen days later.

March 19, 1947, L. O. Benton, Jr., and another stockholder requested the officers and Directors of South Western to postpone the proposed stockholders meeting of March 28, 1947, for sixty days in order that the whole situation might be presented to all the stockholders from its unfavorable and favorable angles. It was also re

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BRIEF OF COUNSEL FOR THE RESPONDENTS.

STATEMENT OF THE CASE.

South Western Rail Road Company is a railroad corporation, originally incorporated under an Act of the General Assembly of Georgia, approved December 27, 1845 (Acts 1845, page 132). There were several amendments of the charter of South Western Rail Road Company prior to the General Railroad Incorporation Law of the State,

enacted in 1892. All these amendments were Acts of the General Assembly of Georgia. There have been no amendments to the charter since the passage of the General Railroad Incorporation Law of the State.

There is no provision in the original charter of South Western Rail Road Company, or in any amendments thereof, which gives the Company any power to sell its railroad properties. The charter is silent with respect thereto. The principal office and places of business of the Company is in Bibb County, Georgia. The capital stock of this Company consists of 51,911 shares of the par value of $100.00 each, all of which is common stock. 1,440 shares of this stock are owned by Central of Georgia Railway Company, and pledged under the Consolidated Mortgage of the Central (R., page 44). The remainder of the stock of South Western (50,471 shares) is owned by over one thousand stockholders, scattered through nineteen States, the District of Columbia, and England. There are very few large stockholders (R., page 119).

South Western has no mortgage, or other liens, and no funded debt (R., page 44). It is solvent, and no bankruptcy proceedings under Section 77 of the Bankruptcy Act, have been instituted by or against it (R., page 48). Its books showed, as of December 31, 1946, the book value of its road and equipment to be $9,523,736.81, which is made up of the capital stock, $5,191,100.00, plus a write up on the books of $4,247,661.27, which represents additions and betterments put on the property by its lessees from 1869 to 1913, plus miscellaneous items of $84,975.54. The Interstate Commerce Commission valuation—cost of reproduction less depreciation, is $12,830,257.00 (R., page 50).

Its railroad mileage is about 331 miles, and its railroads lie generally between the Georgia lines and the Alabama

lines of the Central System (R., page 44). Emanating from Macon, the lines of South Western form that part of the Central of Georgia System extending from Macon through Fort Valley to Columbus, Georgia; from Macon through Fort Valley to Americus; and Albany, Georgia; and Columbia, Alabama. There joins with the latter line at Smithville, Georgia, a branch which extends to Eufaula, Alabama. Without the South Western, the Central of Georgia could not operate trains from Florida through Macon to the north and west. Without the South Western, the Central could not operate trains from the coal fields, which it touches at Birmingham and vicinity, to Savannah and the coast (R., page 100), except by traversing a route which has heavy grades and bad curves and might be impractical of operation. The Central of Georgia has used for years, as one of its primary main lines, South Western's rails from Macon to Fort Valley, to Columbus, in handling all freight movements coming through the Birmingham gateway (R., page 124).

June 24, 1869, South Western leased its railroads and their appurtenances to the Central Rail Road and Banking Company of Georgia, for and during the entire continuance of the corporate existence of the South Western under its present charter, or under any amendments, or extensions thereof. The minimum rental was Seven Per Cent. on the stock of South Western, plus corporate expenses and taxes (R., pages 44-45).

The properties of Central Rail Road and Banking Company of Georgia, were liquidated through receivership (in the early 1890's), and purchased, for the most part, by Central of Georgia Railway Company, and the leasehold estate of Central Rail Road and Banking Company of Georgia, in and to South Western under the lease above mentioned, by force of and under judicial proceedings,

passed to and became vested in Central of Georgia Railway Company. October 17, 1895, the original lease was renewed and modified for the term of 101 years, renewable in like periods upon the same terms forever, the rental being Five Per Cent. on the capital stock of South Western, plus taxes and organization expenses (R. page 45).

December 19, 1932, a Receiver was appointed for the property of Central of Georgia Railway Company by the United States District Court for the Southern District of Georgia. The Receiver adopted the lease of South Western and operated the South Western as a part of its system of railroads (R., page 45).

June 19, 1940, Central of Georgia Railway Company filed its petition in the District Court of the United States for the Southern District of Georgia, stating that it was unable to meet its debts as they matured, and that it desired to file a plan of reorganization under the provisions of Section 77 of the Federal Bankruptcy Act. Thereupon Trustees in Bankruptcy were appointed by the Court for the properties of Central of Georgia Railway Company and Merrel P. Callaway is now the sole Trustee (R. page 45).

The Trustees of the Central (June 19, 1940—[R., page 51]) entered into a contract with South Western to adopt the lease of October 17, 1895, on a modified basis, whereby the Trustees agreed to pay in lieu of rental the net income of the leased properties, and to guarantee South Western against losses and expenditures for additions and betterments in excess of $50,000.00 per annum (R., page 45).

Thus, South Western was operated by Central of Georgia's Trustee for account of South Western for the period June 19, 1940, to June 30, 1943.

The earnings for this period were:

June 19, 1940, to December 31, 1940	$ 26,506.85
Year 1941	204,707.28
Year 1942	1,260,451.32
First six months—1943	1,293,659.98
Total	$2,732,311.73
Less Federal Income Taxes (Estimated)	1,275,887.99
	$1,456,423.74
Less additions and betterments	50,424.82
Net	$1,405,998.92

(R., page 51).

This contract was terminated July 1, 1943, and thereafter the Trustee adopted the South Western lease for the duration of the Bankruptcy (R., page 45).

On January 28, 1944, Central's Trustee, Merrel P. Callaway, filed his plan of reorganization with the District Court of the United States for the Southern District of Georgia, and contemporaneously therewith filed it with the Interstate Commerce Commission, pursuant to the provisions of the Bankruptcy Act (R., page 102).

With respect to the South Western, the plan provided:

> "Prior to or upon consummation of the plan, the debtor shall also acquire, if they can be acquired on the terms hereinafter set forth, properties at present leased to the debtor by the South Western Rail Road . . . If any of these properties shall not be acquired as a result of the acceptance of the plan by the leased line security holders, then and in that event the lease or leases of any line or lines not so acquired shall be

disaffirmed as of such time at or prior to the consummation of the plan as the Court may direct. The method of acquisition, whether through purchase, merger, or consolidation, shall, subject to the approval of the Commission and the Court, be determined by the Trustee or by the reorganization managers when they begin to function. If the leased lines are acquired, the railroads of each of the three and the personal property appurtenant thereto and all the real estate owned by each lessor, shall be conveyed to the reorganized company; each of said lessors shall waive any damages to which it has become or shall become entitled on account of any breach of lease; and the South Western Rail Road Company shall waive all claims in respect to equipment. Such conveyances and waivers shall in each instance be the sole consideration of the delivery to each of the respective lessors of the securities proposed to be allocated to it as hereinafter specified."

"The debtor" referred to is the Central of Georgia Railway Company (R., page 11).

The securities proposed to be allocated to the holders of South Western Rail Road Company capital stock under the plan were: "Holders of South Western Rail Road capital stock would receive for each $1,000.00 of stock, $423.80 in new first mortgage Series A bonds, and $340.97 in new income bonds of the reorganized Company" (R., page 103).

So, the plan allocated to owners of South Western stock a total of $2,200,000.00 of First Mortgage Bonds, and $1,770,000.00 of income bonds (R., page 46); a total of approximately $3,900,000.00 in bonds, for a property capitalized at $5,191,000.00, valued on its books at $9,500,000.00 plus (R., page 50), and valued by the Interstate Commerce

Commission on a basis of cost of reproduction, less depreciation, at $12,830,257.00 (R., page 50).

Almost immediately after the publication of this plan, the stockholders of South Western met in regular annual meeting on March 9, 1944. There were represented 27,286 shares of the outstanding capital stock of the Company. The President of South Western, then and now, was and is Anton P. Wright, Esq. At that meeting he introduced a resolution which included the following: "Resolved by the stockholders of the South Western Rail Road Company that the terms of the purchase proposed by the Trustee are hereby declared to be grossly unfair and inadequate to South Western Rail Road and are hereby unhesitatingly rejected." This resolution passed by a unanimous vote, with the exception of the dissenting vote of one stockholder who owned 100 shares of stock (R., page 104).

At the next annual meeting of the stockholders of South Western, held on March 8, 1945, the resolution of the 1944 meeting was reaffirmed 23,684 to 100 (R., page 104).

On July 13, 1945, the Interstate Commerce Commission, in its report on the plan, said:

> "The properties dealt with in the plan include the properties at present leased to the debtor by the South Western Railroad Company, Augusta and Savannah Railroad, and Chattahoochee & Gulf Railroad Company. It is assumed in this plan that these properties will be acquired in some manner as a result of the acceptance of the plan by the leased line security holders; but that if the offers are not accepted by any or all of the leased lines, the leases of any such line or lines are to be disaffirmed. The exact method of acquisition, whether through purchase, merger, or

consolidation, is not at present determined but, subject to the approval of the Commission and the Court, is left to the judgment of the trustee or the reorganization managers when they begin to function, in order that it may be accomplished by a method which will be most advantageous to the reorganized company.

"Specifically, it is proposed that the railroads of each of the three leased lines and the personal property appurtenant thereto and all of the real estate owned by each shall be conveyed to the reorganized company; that each of said lessors shall waive any damages to which each lessor has become or shall become entitled to on account of any alleged breach of lease and that the South Western shall waive all claims in respect to equipment, each in consideration of the delivery to it of the new securities proposed to be allocated to it as hereinbefore specified; provided, however, that this proposal as to the Chattahoochee & Gulf Railroad Company shall be subject to withdrawal if the reorganized company shall not acquire the railroads of the South Western.

"Securities offered to the leased lines would not bear interest or dividends for any period prior to acquisition of the respective leased lines.

"If the plan provision should not be accepted as to any of the leased lines, the lease of such line, or lines, would be disaffirmed as of such time as the District Court determines that the security holders of said line have not consented to the proposals contained in this plan. Thereupon, the remedies which such leased line and its security holders would have would, it is assumed, be limited to (1) the taking back of its property covered by the rejected lease, and (2) the payment of any sums due under the terms of (fol. 100) the respective leases as modified from time to

time during the receivership and the reorganization proceedings of the debtor. While such lessor would also have a claim for damages for breach of lease upon the disaffirmance in such amount as it might establish before the Court, the debtor trustee believes that no securities of cash would be allocable for the payment of such claim because the same would be considered an unsecured claim similar to the other unsecured claims for which no provision is made in this plan" (R., pages 72-73).

The Commission approved the plan.

Immediately thereafter, on July 28, 1945, there was a called meeting of the Board of Directors of South Western. It was decided at this meeting that if the plan were approved by the District Judge, a meeting of the stockholders would be called, and that accompanying each proxy sent to the stockholders would be a letter prepared by the President and General Counsel, setting forth in detail why the Board was recommending to the stockholders that the offer be rejected. In addition, the letter would state that it was the intention of the holders of the proxies to vote against the acceptance of the offer (R., pages 104-5).

By the time the next annual meeting of the stockholders was held (March 14, 1946), the plan had not yet been approved by the District Judge. To the 1946 meeting the Directors submitted a report stating:

"The stockholders of this Company, in meeting assembled, and upon two occasions, have rejected the price offered for their property in the plan of reorganization. The offer for that property, in the opinion of your Directors, is entirely inadequate, unfair and unjust to the stockholders of this Company. The conclusions reached in the plan are based on misleading

quested that before any proposition of sale was submitted to the stockholders, that another meeting of the Board of Directors be called, at which Benton and others similarly situated might present their views both legal and factual. The President of South Western had expressed the opinion to the stockholders in a letter of March 14, 1947 (R., page 111), that under the laws of Georgia, the assent of a majority of South Western's stockholders was required for a sale of the railroad's properties.

At that time, the Interstate Commerce Commission had sent to the officers of South Western a ballot to be completed, signed, and filed with the Commission by March 28, 1947, signifying the acceptance or rejection by the South Western of the plan of re-organization, in so far as it affected it (R., pages 114, 137).

The officers and Directors refused to postpone the meeting of stockholders proposed to be held on March 28, 1947.

In this situation, Benton and another stockholder, on March 25, 1947, presented to the Honorable Mallory C. Atkinson, a Judge of the Superior Courts of Bibb County, Georgia, in which the principal office of South Western is located, a petition for injunction against the South Western, its officers and Directors, in which it was prayed:

(a) That the officers and Directors be restrained and enjoined from holding a stockholders meeting on March 28, 1947, and from submitting to such meeting the proposed plan to sell the railroad properties of South Western;

(b) That if the Court should not restrain and enjoin the holding of the stockholders meeting, and if at that meeting a mere majority of the stockholders would vote in favor of the acceptance of the plan, and the resulting

sale of all the railroad properties of South Western, that the officers and Directors of South Western be restrained and enjoined from carrying such action of the stockholders into effect, and specifically, that the officers and Directors be restrained and enjoined:

(1) From filing with the District Court of the United States for the Southern District of Georgia, or with the Interstate Commerce Commission any acceptance of the plan, and that

(2) The officers and Directors of the company be restrained and enjoined from selling to the re-organized Company, or to any one else, or any other company, all the Company's railroad properties, rights, and franchises, and that

(3) They be restrained and enjoined from executing any written instrument which might convey the fee-simple title to the properties unto the re-organized Company, or any other company, and

(4) They be specifically restrained and enjoined from doing any act in behalf of the South Western Rail Road Company which might tend to consummate the plan of re-organization of Central of Georgia Railway Company with respect to the acquisition of the properties of the South Western (R., pages 115-116).

The bases of the petition for injunction were:

(a) The properties of South Western could not be sold, under the laws of Georgia, by the vote of a mere majority of the stockholders (R., pages 111-113);

(b) The action of the Board of Directors in disobeying the repeated and almost unanimous desires of the stockholders with respect to a sale of South Western properties constituted a strong case of mismanagement (R., page 114);

(c) Any passage of the resolution of sale by the stockholders would be beyond the charter powers of the Company (R., page 114).

The petition also charged on information and belief that "the present management of the Central of Georgia Railway has for the last week had out over Georgia representatives actively soliciting votes for the ratification of the plan" (R., page 110).

Judge Atkinson signed a rule nisi, requiring the defendants to show cause on March 26, 1947, why they should not be enjoined as prayed. This hearing was held on March 26 and 27 (R., page 20). The Court announced that an order would be passed March 29 (R., page 20). The stockholders of South Western met on March 28, 1947, and assented to the offer of purchase, 30,137 shares being voted in favor, 9,057 shares against (R., page 49). The remaining 12,717 shares did not vote.

No order was passed by Judge Atkinson on March 29, the passage of such order being deferred for an additional week upon request and agreement of counsel (R., page 20).

Thereafter, upon informal request acquiesced in by counsel for both parties, the passage of the order was further deferred. (R., page 20).

On April 18, 1947, Merrel P. Callaway, as Trustee of the Central of Georgia (not a party to the State Court suit), filed with Federal Judge Scarlett of the District Court of the United States, a petition to enjoin Benton and the other stockholders from further prosecuting the State Court suit. The Federal Judge granted a temporary restraining order (R., page 8).

April 24, 1947, Judge Atkinson of the State Court, of his own motion, issued an interlocutory injunction against the

defendants in the State Court suit. He overruled the charge of mismanagement made against the defendants, and put his grant of injunction on the ground that South Western had no charter power to sell its railroad without unanimous consent of its stockholders (R., page 48; the injunctive order is shown in full, R., pages 20 et seq.).

May 26, 1947, Merrel P. Callaway, as Trustee, amended his petition in the Federal Court by bringing to the attention of that Court the injunctive order of the State Court and praying that the Federal Court adjudicate the question whether, under the laws of Georgia and the circumstances of the case, the unanimous consent of the South Western's stockholders was a condition precedent to the acceptance of the plan by the South Western and the consummation of the plan by the conveyance of its property to the reorganized Company, and, further, that the injunctive order of the Superior Court of Bibb County be annulled and declared void, and that when the plan should be confirmed by the District Court that such order be passed as would make effective the acceptance and consummation of the plan by South Western (R., pages 23-25).

The Federal Court Was Not Asked to Adjudicate the Question of Mismanagement.

Benton had filed defensive pleadings to the original Federal Court action (R., pages 9, 11). In these defensive pleadings in response to Paragraph Six (R., page 2) of the complaint, he averred:

> "The allegations of paragraph six (6) are true. However, this respondent avers that of the 30,137 shares which were permitted by the officers of South Western to vote or be voted in favor of the resolution, 6,296 shares were voted by a director of South West-

ern under proxies which had (fol. 20) been solicited by a brokerage firm employed by the management of the debtor. Such proxies, except two, were obtained by said brokerage firm prior to March 13, 1947. As to these 6,296 shares, an attorney for this respondent stated at the meeting of March 28, 1947, the following:

"'In further elucidation of my position, I want to state that it is my information—I don't state it as a fact—I want to state it is my information, those shares were obtained by solicitation of Varnedoe, Chisolm & Co., or their employes, upon the employment of the Central of Georgia Railway Co. I sought at the early part of the meeting to get an opportunity to find out and a resolution to that effect was voted down. Of course, if that is not true, somebody can tell me so now.'

"Mr. Varnedoe, a member of the said brokerage firm and Mr. T. M. Cunningham, counsel for the Trustee, were present when this statement was made. It was not denied. On behalf of this respondent and other stockholders, the officers of the Company were requested to refuse to permit these shares to be voted. The presiding officer refused this request. Your respondent avers that these shares should not have been permitted to be voted. Had that action been taken, the resolution would not have passed.

"The presiding officer also permitted the voting of other shares of stock in favor of the resolution when, as a matter of law and equity, such shares should not have been voted.

"No stockholder personally present at the meeting of March 28, 1947, voted in favor of the resolution save directors of South Western and an agent of the debtor."

In response to Paragraph Ten (R., page 4) of the Complaint, he averred:

"This respondent says that the allegations of paragraph ten (10) of the complaint are a conclusion of law, and not an allegation of fact which he is required to answer.

"He respectfully says, however, that the question of whether or not the properties of South Western Railroad Company can legally be acquired by the reorganized company or the debtor on the terms set forth in the plan by a simple majority vote of the stockholders of South Western Railroad Company is not a question of which this Honorable Court has exclusive jurisdiction.

"The plan does not provide that the properties may be acquired by a simple majority vote of the stockholders of the company. Neither does the order of this Court of June 24, 1946.

"Whether the properties of this company could be acquired by the debtor or the reorganized company on the terms set forth in the plan was left by the Commission and by this Honorable Court to the stockholders of the company to decide. Whether such acceptance on the part of the company could be based on a vote of the majority of the outstanding stock of the company, was a question as to which this respondent and other stockholders on the one hand, and the officers of the company, on the other hand, differed. That difference was placed before the Superior Court of Bibb County by this respondent by his petition of March 25, 1947, for decision at a time when this Honorable Court had no proceedings before it in which that question could be determined, even if this Honorable Court should have had jurisdiction to decide it.

(fol. 23) "The proceedings in the State Court would not have the effect of defeating or impairing the jurisdiction of this Honorable Court in the reorganization proceeding."

In response to Paragraph 14 (R., page 5) of the complaint, he averred:

"The allegations of paragraph 14 constitute a conclusion of law. Even if the allegations are a correct conclusion of law, neither the Interstate Commerce Commission nor this Honorable Court in the plan of reorganization has decided that the railroads of South Western Railroad Company shall become a part of the reorganized system of railroads of the Debtor.

"On the contrary that question was in the plan left to be decided by the shareholders of South Western. The plan distinctly provides:

> " 'If any of these properties (including South Western) shall not be acquired as a result of the acceptance of the plan by the leased-line security holders (sic), then and in that event the lease or leases of any line or lines not so acquired shall be disaffirmed as of such time at or prior to the consummation of the plan as the Court may direct.'

"The original report of the Interstate Commerce Commission recognizes that South Western's properties may not be acquired, and recognizes that South Western has the right of severance if it cares to exercise it. The reports also recognize the fact that they, as an incident to proceedings for the reorganization of the Central of Georgia Railway Company, deal with suggestions for the acquisition of South Western Railroad Company and state that no

petition for the reorganization of that company has been filed.

"The question whether the railroads of South Western Railroad Company may be acquired by the debtor or the reorganized Company on the terms set forth in the plan was left by the Commission and this Court to be determined by the stockholders of South Western. Whether the offer in (fol. 25) the plan may be accepted by the South Western by a simple majority vote of its stockholders is under its charter and other laws which may be applicable thereto, a question of law which is now being litigated in a proper forum which first assumed jurisdiction of that question. That question can be settled or decided in the State Courts without interfering with the possession or jurisdiction of this Honorable Court.

"Until this action was instituted and the restraining order granted, the Trustee, with the approval of this Court and the Commission, had merely made an offer to South Western Railroad Company which it could accept or reject as its stockholders might determine. The stockholders are in dispute as to what constitutes a valid acceptance. This dispute has been laid before a Court of the State of Georgia for determination."

He now filed objections to the allowance of the amendment, and a responsive pleading to it (R., pages 25 et seq.).

June 23, 1947, Dr. W. G. Lee and others, individually and as members of an Executive Committee of a Stockholders Protective Committee, representing more than 5,000 shares of stock of South Western, intervened in the

Federal Court action in support of the petition of L. O. Benton, Jr. (R., page 32).

On August 15, 1947, the Federal Judge, after hearings, granted a permanent injunction against Benton and the intervenors, and nullified the State Court order of April 24, 1947 (R., page 69).

An appeal was taken (September 9, 1947—R., pages 70-71).

January 13, 1948, the Circuit Court of Appeals (Judges Holmes and Lee concurring, Judge Hutcheson dissenting) reversed the judgment of the Federal District Court (R., pages 183, 193). March 15, 1948, your Honors granted the petition of the Trustee for certiorari (R., page 206).

BRIEF AND ARGUMENT.

We submit that the **prime question** in this case is:

Under the facts and the law applicable thereto, did the Bankruptcy Court have exclusive jurisdiction to determine whether the fee-simple title to the properties of South Western could be acquired by the Central on the terms set forth in the plan by a mere majority vote of the stockholders of South Western?

The question may be otherwise stated:

> "The writ of injunction shall not be granted by any Court of the United States, to stay proceedings in any Court of a State, **except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy.**"
>
> Judicial Code, Section 265, 28 U. S. C. A., Section 379.

Did the bankruptcy court have jurisdiction by reason of the **express** statutory exception hereinabove emphasized, or by any **implied** exception to the general rule which is: The writ of injunction shall not be granted by any Court of the United States to stay proceedings in any Court of a State? . . . .

Preliminary to a discussion of these legal questions, it is well to note at the outset the exact language of the plan as to South Western Rail Road Company. It is:

> "Prior to or upon consummation of the plan, the debtor shall also acquire, if they can be acquired on the terms hereinafter set forth, properties at present leased to the debtor by the Southwestern Railroad Company, . . ." (R., pages 11-12).

The plan does not provide that the properties of South Western might be acquired by a simple majority vote of the stockholders of South Western. The question of stockholder authority by which the properties of South Western might be acquired by the debtor was not dealt with in the plan. When Benton instituted his suit in the State Court there was no proceeding pending in the District Court in which the question could have been determined in the District Court.

Whether the properties of South Western could be acquired by the debtor or the reorganized company on the terms set forth in the plan, was left by the Commission and by the Bankruptcy Court (the District Court) to the stockholders of the Company to decide. Whether such acceptance on the part of the Company could be based on a vote of a mere majority of the outstanding stock of the Company was a question as to which respondents and other stockholders on the one hand, and the officers of the Company on the other hand, differed. That difference was placed before a Court which had jurisdiction to determine it—the State Court of Equity of the home office of the South Western Rail Road Company—the Superior Court of Bibb County, Georgia. That difference was placed before that Superior Court by Benton in his petition of March 25, 1947, for decision at a time when the District Court had no proceedings before it in which that question could have been determined, even if the District Court had had jurisdiction to decide it on the petition of a stockholder, officer, Director, or the Company.

The South Western Rail Road Company is not in reorganization. It is perfectly solvent.

It was specifically pointed out by the Interstate Commerce Commission in the Submission, which is made a part of the record (R., page 73):

"This docket and report, **as an incident to proceedings for the reorganization of the Central of Georgia Railway Company,** deal with **suggestions** for the reorganization and acquisition of the lessors, South Western Railroad Company, Augusta and Savannah Railroad, and Chattahoochee & Gulf Railroad Company. No petitions for the reorganization of the lessors have been filed." (Emphasis ours.)

261 I. C. C. Financial Reports, page 501.

The proceedings in the State Court would not have the effect of defeating or impairing the jurisdiction of the District Court in the reorganization proceeding, for the simple reason that neither the Commission nor the District Court had sought, at the time of the institution of the State Court suit, to adjudicate the question of whether or not the properties of the South Western could legally be acquired, or by what measure or quantity of stockholder authority they could be acquired.

The plan did not provide that the debtor should or must acquire the South Western. The plan merely provided that the debtor should acquire the South Western properties "if they can be acquired on the terms hereinafter set forth" (R., pages 11-12).

The plan merely and simply authorized the debtor to make an offer to South Western for its properties. Whether or not that offer could be accepted by South Western, and if so, by what authority, was left wide open by the Commission and by the District Court, prior to the institution of the State Court suit.

That the plan merely and simply authorized the debtor to make an offer to South Western for its properties was fully recognized in a statement made by T. M. Cunningham, Esq., counsel for the Trustee of the debtor, at the stockholders' meeting of March 28, 1947, when he said:

"The plan makes an offer to you gentlemen; that is all it does."

Mr. Cunningham admitted that he made this statement, but in connection with his admission, stated: "Of course, that is not all the plan says, but that is what in substance it does say—take it or leave it" (R., page 54).

By what rule of law, known up to this time, was the Superior Court of Bibb County, Georgia, the Court of Equity of the residence of South Western, deprived of the right to adjudicate the question of whether or not the stockholders of South Western had "taken it or left it"—whether or not the stockholders of South Western could legally, under the laws of Georgia, accept the offer which had been made to them, and if so by what degree or quantity of authority?

We respectfully submit that under no case construing the Railroad Reorganization Act, decided by your Honors up to this time, has that question been answered adversely to the contentions of the respondent here.

Smith v. Hoboken R. R. Warehouse and S. S. Connecting Co., 328 U. S. 123, 66 Sup. Ct. 947, does not answer it. There the debtor operated a terminal switching railroad at Hoboken, New Jersey. The major part of its right of way and line of railroad was leased by it from Hoboken R. R. Warehouse and S. S. Connecting Company. The debtor (lessee) was in reorganization. Smith was the Trustee. The lessor moved the reorganization Court to terminate the lease. The Court granted the order, holding that the appointment of the Trustee was a breach of the terms of the lease entitling the lessor to re-enter. The Circuit Court of Appeals affirmed (150 Fed. [2d] 921). The Supreme Court reversed. The basis of the reversal is shown in division four of the opinion (328 U. S., at pages 128-9):

"But the question remains whether enforcement of the forfeiture clause would be consistent with the provisions of Section 77 (of the Bankruptcy Act) within the meaning of Section 77, sub. L. That question does not seem to have been considered by the lower Courts. Our view is that it presents problems primarily for consideration and decision by the Interstate Commerce Commission and that the reorganization Court should not have declared a forfeiture of the lease **until the question had been passed upon by the Commission.**" (Emphasis ours.)

The Commission there had not yet approved or formulated a plan of reorganization. The Court called attention to that fact, and after reviewing the necessity of the status quo being maintained until the Commission could formulate or approve a plan of reorganization, said:

"The point is that **if** the reorganization Court decreed a forfeiture **in advance of consideration of the problem by the Commission,** it interferes with the functions entrusted to the Commission under Section 77. . . . If forfeiture of leases can be decreed **without prior reference of the matter to the Commission, it may be seriously embarrassed in preparing the plan which it deems necessary or desirable for the reorganization** of the debtor. . . . We hold that the District Court erred in declaring the lease forfeited and that the judgment should be reversed and the cause removed. The District Court should stay its hand **pending a decision by the Interstate Commerce Commission on the question.**" (Emphasis ours.)

The emphasized portion of the foregoing quotation demonstrates that that case does not decide the prime question here.

In that case the reorganization Court declared a lease forfeited before the Commission could pass upon the im-

port of the lease in the formulation of a plan of reorganization. Your Honors simply instructed the reorganization Court to "stay its hand" until the Commission could pass upon the questions at issue in connection with a plan.

In our case the Commission had acted. The Commission had said to the debtor: Acquire the South Western's properties if you can. If you cannot, its lease stands disaffirmed.

In our case the Commission has considered the problems. It has approved a plan. There remained no question for consideration by the Commission.

The same distinction applies to **Thompson v. Texas Mexican Railway Company, 328 U. S. 134, 66 Supreme Court 937.**

There "Tex-Mex" sued Thompson, Trustee for "Brownsville Railroad" (St. Louis, Brownsville and Mexico Railway Company) in a Texas State Court to enjoin Brownsville and its Trustee from using certain trackage which it had been using under a trackage contract, and to recover damages for the use. The State Courts held that the trackage contract had been terminated and awarded Tex-Mex large damages. This Court granted certiorari and reversed.

In reversing, your Honors, at page 142 of the official report, alluded to Smith v. Hoboken, decided the same day, said:

> "We think that the same considerations are applicable to a determination that the trackage agreement in this case should be terminated **pending formulation of a reorganiaztion plan.** By Section 77, sub. b, the plan of reorganization may adopt or reject executory contracts of the debtor as well as unexpired leases. And the adoption of either an executory contract or of

a lease by the Trustee does not preclude a rejection of it in the plan. Moreover, trackage agreements like leases of railroad tracks and facilities are means by which railroad systems have been assembled. The retention or the sloughing off of trackage agreements may assume importance in the fashioning of a plan of reorganization by the Commission. The problem is kin to that involved in Continental Illinois National Bank and Trust Company v. Chicago, Rock Island and P. Ry. Co., 294 U. S. 648, 55 S. Ct. 595, 79 L. Ed. 1110. In that case the Court sustained the power of the reorganization Court to enjoin under Section 77 creditors, who held collateral notes of the debtor railroad secured by its bonds and bonds of its subsidiaries, from selling the collateral under a power of sale in the notes, where the sale would so hinder, obstruct, or delay the plan of reorganization as would likely defeat it. The Court states, 294 U. S., at pp. 676, 679, 55 S. Ct., at page 606, that a proceeding under Section 77 is a 'special proceeding which seeks only to bring about a reorganization, if a satisfactory plan to that end can be devised. And to prevent the attainment of that object is to defeat the very end the accomplishment of which was the sole aim of the section, and thereby to render its provisions futile.' The Court concluded, in view of the complexity of the problems involved in the reorganization, **'that without the maintenance of the status quo for a reasonable length of time no satisfactory plan could be worked out.'** " (Emphasis ours.)

Here a plan had been worked out before the institution of the suit in the State Court.

And, further, on pages 142 and 144:

"We think like reasons make it important that the status quo of this trackage agreement be maintained

pending decision by the Commission as to the proper treatment of it in the reorganization plan. The Commission may decide that it should be adopted. Or the Commission may conclude that the trackage agreement should be rejected or that its termination pursuant to its terms should be allowed. These matters involve not only the interests of the two parties to the trackage agreement, but phases of the public interests as well.

"A Court which enforced the termination clause of the agreement pursuant to its terms would be narrowing the choice of the Commission and perhaps embarrassing it in the performance of the functions with which it has been entrusted. For these and like reasons which we have discussed in Smith v. Hoboken Railroad, W. & S. C. Co., supra, we think the Court erred in holding that the trackage agreement has been or should be terminated."

And the Court concluded, page 151:

"Thus, however, the case may be viewed, the Court below should have stayed its hand and remitted the parties to the Commission for a determination of the administrative phases of the questions involved. Until that determination is had it cannot be known with certainty what issues for judicial decision will emerge. Until that time judicial action is premature. The judgment will be reversed and the cause remanded so that the case may be held pending the conclusion of appropriate administrative proceedings."

The "appropriate administrative proceedings" in our case are concluded.

The Commission and the District Court had impliedly remitted to any competent Court for a decision the question of whether the properties of South Western might be

legally acquired, and, if so, by the exercise of what quantity or quality of corporate authority.

Is there any better forum for the determination of these questions of Georgia law than the Georgia State Courts?

Since the rendition of the judgment of the Circuit Court of Appeals in this case, three cases have been decided which will probably be urged by the petitioners as authority for their position here. The latest of these is In re Chicago, Rock Island and Pacific Railway Co. (State of Texas v. Brown et al.) (C. C. A., 7th Circuit), 168 Fed. (2d) 587, in which the Court said:

> "We have no doubt, indeed, we understand that appellant admits that under the repeated decisions of the Supreme Court, the most recent of which are Seaboard Air Line Railway Company v. Daniels, 333 U. S. 118, 68 S. Ct. 426, and Schwabacher et al. v. U. S. et al., 68 S. Ct. 958, 963, the Commerce Commission has, under the Constitution and laws of the United States, the power, the duty, 'to control rate and capital structures, physical make-up and relations between carriers, in the light of the public interest in an efficient national transportation system,' '(the) laws of any State to the contrary notwithstanding.' This authority exists irrespective of whether the Commission acts in pursuance of its power under the Interstate Commerce Act, or under the Acts relating to bankruptcy, for bankruptcy administration, including reorganization is, under the Constitution, equally a paramount national function. Continental Bank v. Rock Island Railway, 294 U. S. 648, 55 S. Ct. 595, 79 L. Ed. 1110. It is immaterial that the exercise of either power conflicts with State enactments" (page 590).

Assuming, for the sake of the argument, that that is a correct statement of the law, its urging here would beg the

question. We are not concerned now with the question of what power, duty and authority the "Commerce Commission" might have exercised. We are only concerned with the legal effect of the power and authority which was exercised. We do not seek to avoid the order of the Commission. We do not ask that it be regarded as void. We give full effect to the language of the plan: "Prior to or upon consummation of the plan, the debtor shall also acquire, if they can be acquired on the terms hereinafter set forth, properties at present leased to the debtor by the South Western Railroad Company . . ."

We simply say that the question whether the debtor can acquire the properties of the South Western on the terms, for the price set out in the plan by an acceptance of the offer of the Trustee, when that acceptance is authorized by a mere majority vote of the stockholders, is not a question which the Bankruptcy Court has exclusive jurisdiction to decide.

Our question is more nearly determined by the decision of this Court in the case of Central New England Ry. Co. v. Boston and Albany R. Co., 279 U. S. 415, cited by this Court in Thompson v. Texas Mexican Railway Company, 328 U. S. 134, at page 151. There the Court announced situations in which suits could be maintained in the State Court **after** action by the Commission. The language used by the Court immediately prior to its citation of the Central New England Ry. Co. case, supra, demonstrates that we have in our case a situation in which resort may be had to the State Court. That case involved an action against a railroad for breach of contract for lease of tracks of another railroad, wherein the defense was that defendant's contractual obligations were annulled by an order of the Interstate Commerce Commission under the Interstate Commerce Act, Section 1, Paragraphs 18-20, as amended by

the Transportation Act, 1920, Section 402 (49 U. S. C. A., Sections 1, 18-20). This action was held to be within the jurisdiction of the State Court because the plaintiff did not seek to have the order set aside, or ask that it be regarded as void, but contended only that the order did not have the effect of annulling the contract.

Another of the three cases referred to just hereinabove is: Seaboard Air Line R. Co. v. Daniel, Attorney General of South Carolina, ... U. S. ..., 68 Sup. Ct. Rep. 426. We confidently assert that the rationale of Mr. Justice Black's opinion in that case supports our position here—that the State Court has jurisdiction to determine whether the South Western could accept the offer authorized in the plan, and if so, by what measure of corporate authority. There the Seaboard Air Line Railroad Company sued in the South Carolina Supreme Court to enjoin the State's Attorney General from attempting to collect certain statutory penalties on the ground that the railroad company was authorized by an order of the Interstate Commerce Commission to operate within the State without complying with the State laws involved.

The Court said:

> "Although the jurisdiction of the South Carolina Supreme Court was there conceded, and is not here challenged, we think it appropriate to pass upon it. So far as the appellant's complaint is concerned, this is not the kind of action to 'set aside' a Commission's order of which the Federal District Courts have exclusive jurisdiction. While the action does involve the scope and validity of a Commission order, the relief requested in the complaint was the removal of an obstruction to the railroad's obedience to the order, not its suspension or annulment. Nor did the answer seek to have the enforcement of the

order enjoined, although it did question its validity as a basis for the relief sought in the complaint" (68 S. Ct., at page 429).

A fortiori, the State Court had jurisdiction of our action, for:

(1) We did not seek to "set aside" the Commission's order;

(2) Our action does not involve the scope and validity of a Commission order;

(3) Our action did not seek to have the enforcement of the order enjoined, nor did it question the validity of the order.

Our position is similar to that of the respondent in Central New England Ry. Co. v. Boston and Albany R. C., 279 U. S. 415, 421, stated thus by the Court:

> "Here, respondent does not ask that the order be set aside or that it be regarded as illegal and void: it insists only that the order did not purport to deal with the contract between the carriers, and so cannot have the effect, attributed to it by the petitioner, of annulling the contract. **The question is merely one of the legal effect of the order.** Neither party contests its validity or asks that the carrier be compelled to do anything inconsistent with its terms." (Emphasis ours.)

Immediately following the language in Seaboard Air Line v. Daniel, hereinabove quoted, is:

> "The appellant was in this dilemma. Federal law required it to obey the order so long as it remained in effect; for a failure to abide by its terms serious federal penalties could be imposed on it. . . . On the other hand, South Carolina statutes provided

penalties for obedience to the order, which South Carolina officials asserted were enforceable against appellant despite the Commission's order. There was thus a bona fide controversy between appellant and the State officials over the validity of the order. Appellant wanted to obey the order; the State officials insisted appellant must obey their statutes instead. Federal District Courts have not been granted special jurisdiction to review and confirm orders of this Commission at the suit of railroads wishing to obey such orders. Under the foregoing circumstances appellant was not compelled to wait until some one who had standing to attack the Commission's order might decide to seek its annulment in a Federal District Court. It properly sought relief from a Court which could obtain jurisdiction of the parties whose refusal to recognize the order gave rise to its predicament. And the State Court then had power, because of the issues raised by the complaint and because of the relief required, to determine whether the order, properly interpreted, did exempt appellant from compliance with the state railroad corporation laws, and, if so, whether the Commission had transcended its statutory authority in making the order."

At the time Benton instituted his suit in the State Court (March 25, 1947), the situation was this:

On March 14, 1947, the President of South Western had stated in a letter to stockholders that a majority of them could authorize the Company to sell its properties—"accept the offer to purchase the physical properties of our Company contained in the plan of reorganization . . ." (R., page 11). Benton disagreed with this view of the law. There was a controversy between Benton and the officers of the Company, not over the validity of the Commission's order, but concerning the question of the quantum

of corporate authority necessary for a valid acceptance of the offer contained in it. Certainly under the Georgia Declaratory Judgment statute (Code of 1933 [Supp.], Section 110-1101 et seq.) the South Western could have asked the proper State Court of Georgia to determine the controversy, and declare the requisites of a valid acceptance. It did not take that action. Benton had to act, and act promptly.

We know of no statute which would have given him the right to proceed in the Bankruptcy Court, or any other Federal District Court, to review, confirm, interpret, or construe the Commission's order. He was not seeking to "set aside" the Commission's order. So, he entered the only Court which had jurisdiction at his behest to construe the effect of the order, to determine the requisites of a valid acceptance—the Superior Court of Bibb County, the County of the residence of the South Western, and some of its officers and Directors. He prayed that that Court enjoin the holding of the stockholders' meeting, set to be held on March 28, 1947, and that "if this Honorable Court should not restrain and enjoin the holding of the stockholders' meeting, as herein prayed, and that if at that meeting a mere majority of the stockholders should vote in favor of the acceptance of the plan and the resulting sale of all the railroad properties of the defendant corporation, that the officers and Directors of the defendant Company be restrained and enjoined from carrying such action of the stockholders into effect . . . ." (R., page 115).

Much has been said about the scope and breadth of the prayers of this action, but the Court will readily see that its sole purpose, as respects this particular question, was a judicial determination of the question of whether or not South Western could accept the offer made to it in the plan and sell its properties by the vote of a mere majority

of its stockholders. And, therefore, paraphrasing the language last quoted from the Daniel case: The State Courts had power, because of the issues raised by the complaint and because of the relief requested, to determine whether the offer contained in the plan could be accepted by the South Western upon the vote of a mere majority of its stockholders.

The third of the three "recent cases" is Schwabacher v. U. S., 68 Sup. Ct. 958. There, Schwabacher and others had sued the United States of America, the Interstate Commerce Commission, and others, to set aside the Commission's order approving a merger of the Chesapeake & Ohio Railway Company, the Pere Marquette Railway Company (a Michigan Corporation), and the Allegheny Corporation. The plaintiffs (appellants) were owners of certain preferred stock of Pere Marquette. They contended that the merger (which was a voluntary merger) terminated the corporate existence, and under a clause of Pere Marquette's charter as construed by Michigan law, amounted to a "winding up" of the corporation, and that under Michigan law, they had the right to have their shares recognized on the basis of at least $172.50 each. The Commission found the market value per share ranged from $87.00 to $99.00, while the merger terms gave stocks in exchange which would have realized about $90.00 and $111.00 per share on the same dates. Plaintiffs dissented from the merger, but Michigan law provided no specific right or procedure for retirement and appraisal of the holdings of a stockholder dissenting from a railroad merger. When the application was filed with the Commission under Section 5 of the Interstate Commerce Act for approval of the merger, the plaintiffs intervened and asked that body to determine, recognize, and protect their asserted right to the full legal liquidation figure. The Commission approved the merger and the merger terms, finding them just and reasonable as to each class of stock-

holders. However, it disclaimed jurisdiction to pass upon the further claims of the plaintiffs (appellants), asserted on the basis of their interpretation of Michigan law.

The Supreme Court, in concluding the majority opinion, said:

> "We therefore hold that no rights alleged to have been granted to dissenting stockholders by state law provision concerning liquidation survive the merger agreement approved by the **requisite number of stockholders** and approved by the Commission as just and reasonable. Any such rights are, as a matter of federal law, accorded recognition in the obligation of the Commission not to approve any plan which is not just and reasonable. In making that determination, those rights are to be considered to the extent that they may affect intrinsic or market values. While the Commission has found that what the appellants are given in this plan is just and reasonable, the record indicates that it may have declined to consider these claims, even if they are found to have some effect on the intrinsic value of the stock, because it thought it lacked jurisdiction. Under these circumstances, we cannot be sure that in arriving at its conclusion that the plan was just and reasonable it did not exclude some factors that it should consider under the views set out in this opinion. We therefore reverse the judgment below and remand the case to the Commission for reconsideration under the principles herein expressed."
>
> Schwabacher v. U. S., 68 Sup. Ct. 958, at page 968.

Mr. Justice Reed took no part in the consideration or decision of this case. Mr. Justice Jackson delivered the majority opinion, joined by Justices Black, Douglas, Murphy and Rutledge; Mr. Justice Frankfurter dissented, joined by the Chief Justice and Mr. Justice Burton.

That the Schwabacher case does not decide the case at bar is shown by at least the following distinctions:

(1) The Court and Commission were there dealing with a voluntary merger of carriers under Section 5 of the Bankruptcy Act, which merger had been approved by the requisite number of stockholders under applicable State law;

(2) Appellants then had asked the Commission to determine their asserted right to the full liquidation figure;

(3) The Commission had disclaimed jurisdiction to pass upon appellants' claims based on their interpretation of Michigan law.

In the case at bar, neither before nor after the Commission, in a railroad reorganization case, had approved the plan of reorganization, did any person at interest ask the Commission to decide what measure of corporate authority on the part of South Western should determine whether the debtor could acquire South Western on the terms stated in the plan. The Commission was not asked to assume jurisdiction of that question, and did not assume it or disclaim it. It simply left it to the proper Courts to determine.

We submit that in the situation presented in the case at bar the following language of the majority in the Schwabacher case is apt: "Neither the Commission nor this Court can make a plenary and exclusive decision as to what the law of a State may be, for the function of declaring and interpreting its own law is left to each State of the Union" (68 Sup. Ct., at page 963). The Court did proceed to say then that the effect of a State law in relation to a Constitutional Act of Congress was for the Court to determine. But that question is not present here. This is not a voluntary merger of South Western and Central of Georgia. This is simply a case where the Commission has authorized

a carrier in reorganization to acquire the properties of another corporation, solvent, not in reorganization, without attempting to measure the legal requirements necessary to make that acquisition valid. We are not concerned with the question of whether the Commission under the Railroad Reorganization Act **could** have, in its approval of the plan, laid out such a measure. It did not. It was not asked to. Therefore, the question was left to the proper Court for determination.

> "The function of declaring and interpreting its own law, is left to each State of the Union."
>
> Schwabacher case, supra.

We promptly asked the State Court of Georgia to exercise that function. The Courts of that State should be permitted to continue to exercise that function.

One other "reorganization case" should be considered at this juncture. That is Continental Illinois National Bank & Trust Company of Chicago v. Chicago, Rock Island and Pacific Railway Company et al., 294 U. S. 648; 55 Sup. Ct. 595.

A mere reading of the facts of this case shows the difference between it and the case at bar. **There,** the debtor had outstanding collateral notes secured by mortgage bonds, a part of which were issued by it, part by a corporation forming a part of the system. The holders of the collateral notes were about to sell them. Those having interests adverse to the holders of these collateral notes set forth facts showing that unless the sale of the collateral was enjoined, it would be impossible to prepare and secure approval of a plan of reorganization. No plan of reorganization had been prepared. The bonds, which were about to be sold, were the property of the debtor, and therefore a part of the res in the hands

(d) South Western seeks to avail itself of this Act, and sell its properties by virtue of a resolution adopted by a mere majority of its stockholders;

(e) Minority stockholders seek to enjoin such sale;

(f) The Act of 1933, not having been accepted by the stockholders as an amendment to the charter of South Western by "proper corporate action", the resolution authorizing the sale is a mere nullity;

(g) The sale of the properties was properly enjoined.

The charter of the South Western is no stranger in this Court.

It was considered by the Court in the case of South Western Rail Road Company v. Georgia, 92 U. S. 676. It appeared from the record in that case that the South Western Rail Road Company, chartered in 1845, with an exemption from taxation beyond one-half of one per cent of its annual net income, was united with the Muscogee Rail Road Company, a Company entitled by its charter to a similar exemption. The union was effected under an Act of the Legislature approved March 4, 1856, the effect of which was to extinguish the Muscogee Company by its merger in the South Western. The Court, at page 677, said: "No new corporation was created by the union of the two companies; but the powers of the South Western were enlarged and all the rights, privileges, and property of the Muscogee Rail Road Company became the rights and property of the South Western. The exemption from taxation, which both companies enjoyed under their original charters, cannot, therefore, be withdrawn by the Legislature, and it is unaffected by the tax laws of 1874."

In the first place, this supports our argument that the Act of 1933 (Code of 1933, Sections 9-328 et seq.) does

of the Bankruptcy Court. An injunction, enjoining the sale, was granted by the Bankruptcy Court. The grant of the injunction was affirmed because "The power to issue an injunction when necessary to prevent the defeat or impairment of its jurisdiction is, therefore, inherent in a Court of Bankruptcy as it is in a duly established Court of Equity" (294 U. S., at page 675).

The Court stated, at page 676, "An injunction may be issued in such circumstances for the purpose of protecting and preserving the jurisdiction of the Court until the object of the suit is accomplished and complete justice done between the parties."

The gist of the decision is shown at page 678, in the following language:

> "It is evident that the effect here wrought by the menace of impending sales of the collateral would seriously embarrass and probably prevent the formulation and consummation of a plan of reorganization."

That "gist" shows the utter difference between that case and the case at bar. There, no plan of reorganization had even been formulated. The properties about to be sold by the collateral note holders was property in the hands of the Trustee, and therefore in the hands of the Court. The use of that property was necessary in the formulation and consummation of the plan of reorganization.

> "The sale of the collateral securities from time to time during the progress of this consideration and work well might require such changes of detail in the plan, entailing new and perhaps difficult reconcilements of views among many and conflicting interests, as to forge an abandonment of the proceeding."

not affect the contractual rights of the South Western under its charter.

Secondly, it supports the averment which the respondent made in the State Court suit (R., page 113): "For over one hundred years it had been constantly contended by the officers and Directors of the South Western Rail Road Company that its charter is a contract between it and its stockholders, on the one hand, and the State of Georgia, on the other, which could not be amended by subsequent legislation so as to impair its obligation."

The charter was again before this Court in South Western Rail Road Company v. Wright, 116 U. S. 231, in which, while it was recognized that the exemption from taxation applied to that part of the road built under the original charter, the exemption did not apply to parts of the line built later.

We respectfully submit, therefore, that the Act of 1933 cannot be held to apply to the South Western Rail Road Company.

There are other questions made in the State Court suit which demonstrate that the State Court should be permitted to adjudicate the questions at issue between the respondents and the South Western, its officers and Directors.

One of the bases of the petition for injunction in the State Court was that the action of the Board of Directors, in disobeying the repeated and almost unanimous desires of the shareholders with respect to a sale of the South Western's properties, constituted a strong case of mismanagement (R., page 114).

The law of Georgia provides: "So long as the majority of stockholders confine themselves within the charter

How different is our case. The plan had been formulated, approved by the Commission and by the District Court. The plan recognized that the debtor might not acquire the South Western. The plan says to the debtor, "Acquire it if you can on terms most advantageous to you, but the method of acquisition is left to the Trustee." The question of how it can be acquired in no way defeats or impairs the jurisdiction of the Bankruptcy Court.

None of the other "reorganization cases" cited by the petitioners in either of the Courts below answers the prime question adversely to the contentions of the respondent here.

Those cases were:

In re New York, New Haven & Hartford Railroad, 147 Fed. (2d) 40;

Palmer, Trustee, v. Massachusetts, 308 U. S. 79;

Boston Terminal Co. v. Mutual Savings Bank Group Committee et al., 127 Fed. (2d) 707;

In re Pittsburgh Railway Co., 155 Fed. (2d) 477.

If we are correct in our contention, that the stated question has not been decided adversely to us in any "reorganization case," then—what of the general law?

We realize that in addition to the statutory exception emphasized in Section 265 of the Judicial Code, there were exceptions which the Courts have engrafted upon the section. Among these exceptions is (as expressed in a recent Law Review article), "the res exception which allowed injunctions against State Court proceedings which sought to deal with a res under the jurisdiction of the Federal Court" (California Law Review, December, 1947, Vol. 35, No. 4, pages 545, 546, et seq.).

This exception was treated by the Court in Toucey v. New York Life Insurance Company, 314 U. S. 118, 62 S. Ct. 139, as follows:

"This brings us to the applications of Section 265 apart from these statutory qualifications. The early decisions of this Court applied the Act of 1793 as a matter of course. However, a line of cases beginning with Hagan v. Lucas, 10 Pet. 400, 9 L. Ed. 470, holds that the Court, whether federal or state, which first takes possession of a res withdraws the property from the reach of the other. Taylor v. Carryl, 20 How. 583, 597, 15 L. Ed. 1028; Freeman v. Howe, 24 How. 450, 16 L. Ed. 749. See Kline v. Burke Construction Co., 260 U. S. 226, 235, 43 S. Ct. 79, 83, 67 L. Ed. 226, 24 A. L. R. 1077: 'The rank and authority of the (federal and state) courts are equal; but both courts cannot possess or control the same thing at the same time, and any attempt to do so would result in unseemly conflict. The rule, therefore, that the court first acquiring jurisdiction shall proceed without interference from a court of other jurisdiction is a rule of right and of law based upon necessity, **and where the necessity, actual or potential, does not exist, the rule does not apply.** Since that necessity does not exist in actions in rem and does not exist in actions in personam, involving a question of personal liability only, the rule applies in the former but does not apply in the latter.' The Act of 1793 expresses the desire of Congress to avoid friction between the federal government and the states resulting from the intrusion of federal authority into the orderly functioning of a state's judicial process. The reciprocal doctrine of the res cases is but an application of the reason underlying the Act. Contest between the representatives of two distinct judicial systems **over the same physical property** would give rise to actual physical friction. The rule has become well settled, therefore, that Section 265 does not preclude the use of the injunction

by a federal court to restrain state proceedings seeking to interfere with **property** in the custody of the court. Farmers Loan & Trust Co. v. Lake Street Elevated R. Co., 177 U. S. 51, 60, 20 S. Ct. 564, 568, 44 L. Ed. 667; Kline v. Burke Construction Co., 260 U. S. 226, 229, 235, 43 S. Ct. 79, 81, 83, 67 L. Ed. 226, 24 A. L. R. 1077; Lion Bonding & Surety Co. v. Karatz, 262 U. S. 77, 88, 89, 43 S. Ct. 480, 67 L. Ed. 871; see Warren, Federal and State Court Interference, 43 Harv. L. Rev. 345, 359-66. And where a state court first acquired control of the res, the federal courts are disabled from exercising any power over it, by injunction or otherwise. Palmer v. Texas, 212 U. S. 118, 29 S. Ct. 230, 53 L. Ed. 435."

Toucey v. New York Life Insurance Co., 314 U. S., at pages 134-136 (62 S. Ct., at pages 114-145).

In our brief in the Circuit Court of Appeals we stated, as the first of the main questions before that Court:

"Under the facts and the law applicable thereto, did the Bankruptcy Court have exclusive jurisdiction to determine whether the properties of South Western could be acquired by the Central on the terms set forth in the plan by the mere majority vote of the stockholders of South Western?"

What the Circuit Court of Appeals did in the majority opinion was to answer the question hereinabove stated in the negative. In so doing, it necessarily held that neither the statutory exception nor the **res** exception applied to the facts of the case. We submit that it was correct in so holding. In determining the correctness of the ruling, it is first necessary to determine what is the **res** with which we are concerned. The **res** is the fee-simple title to properties leased to the Central of Georgia Railway Company

by the South Western Rail Road. The Interstate Commerce Commission in the plan authorized the debtor (Central of Georgia) to acquire those properties if they could be acquired on the terms set forth in the plan. Thus, the Circuit Court of Appeals described the res involved:

"Because the debtor's trustee has actual possession under its lease of certain tangible property of the South Western Railroad Company, the trustee claims to be in possession of all the property in controversy. We do not concur in this contention. The debtor is seeking (not to enforce a lien upon tangible property as in Warren v. Palmer, 310 U. S. 132, but) to acquire the incorporeal reversionary interest of its lessor, which arose by operation of law when the leasehold was carved out of the free-simple title. This is a vested future interest to commence in possession after the determination of the lease. The lessee is not disputing the lessor's title, but is seeking to acquire it, and is claiming that the bankruptcy court is administering this intangible asset. The fallacy in the argument is this: In the case of a tangible res, there can be possession in fact as well as in contemplation of law; but in the case of something intangible, possession is purely a legal concept that manifests itself only through recognition of legal consequences. So far as pertinent here, the legal consequences of a debtor's possession of a tangible asset at the time of his bankruptcy are that his trustee in bankruptcy succeeds to the debtor's possession, and that the bankruptcy court, acquiring possession thereby, has summary jurisdiction in rem to adjudicate adverse claims respecting the asset. Therefore, for practical reasons, the law attaches to the ownership of intangible property the legal consequences of possession of a tangible res. Thus in this case the law limits the possession of the

lessee to the duration of the lease, while it attaches to ownership of the reversion in fee the legal consequences of possession. Such reversion, not being owned by Central at the time its petition for reorganization was filed, is in legal contemplation not now in possession of the bankruptcy court; and, since the law attributes to its mere ownership the legal consequences of possession, the bankruptcy court has no jurisdiction in rem of said reversionary interest." (Printed Opinion, pages 9-10.)

The utter difference between the majority and minority opinions below is this: The majority opinion treated the res as that "incorporeal reversionary interest of the (its) lessor, which arose by operation of law when the leasehold was carved out of the fee simple title" (page 188)—the lessor's title which added to the leasehold estate constituted the entire fee simple title. That is the res which the Commission had authorized the Debtor in the plan to acquire if it could; that is the res for which the Debtor was authorized to make to the South Western an offer. The minority opinion treated the res as "the reorganization proceeding, including its controversies and questions and the plan it was instituted to bring about" (R., page 199).

We most respectfully submit that the history of the res exception demonstrates the correctness of the opinion of the majority below. When the Courts, in engrafting the res exception upon Section 265, spoke of "a res" in the possession of a Court, they meant "a thing"; "physical property," and not a judicial proceeding.

In the Toucey case, supra, at page 135, the Court recognizes a res as physical property by saying: "Contest between the representatives of two distinct judicial systems over the **same physical property** would give rise to actual

physical friction." (Emphasis ours.) And immediately following the language just quoted is: "The rule has become well settled, therefore, that Section 265 does not preclude the use of the injunction by a federal Court to restrain State proceedings seeking to interfere **with property** in the custody of the Court." (Emphasis ours.)

The first of the line of cases cited by the Court in the Toucey case as holding "that the court, whether Federal or State, which first takes possession of a res withdraws **the property** from the reach of the other" (emphasis ours) is Hagan v. Lucas, 10 Peters 400. There the res was certain slaves. The next is Taylor v. Carryl, 20 Howard 583, where the res was a vessel. Taylor v. Carryl was followed by and in Freeman v. Howe, 24 Howard 450. There the res was certain railroad cars. The Court said:

> "In the case of Taylor et al. v. Carryl (20 Howard 583) the majority of the Court were of the opinion that, according to the course of decision in the case of conflicting authorities under a State and Federal process, and in order to avoid unseemly collision between them, the question as to which authority should for the time prevail did not depend upon the rights of the respective parties to the property seized, when the one was paramount to the other, **but upon the question, which jurisdiction had first attached by the seizure and custody of the** PROPERTY **under its** process. This principle is equally applicable to the case of **property** attached under mesne process, for the purpose of awaiting the final judgment, as in the case of **property** seized in admiralty, and the proceedings **in rem**" (at page 451. Emphasis ours, except as to the phrase **in rem**).

In Kline v. Burke Construction Co., 260 U. S. 226, 43 S. Ct. 79, the Court refused to apply the res exception. Of

that case, we said in our brief in the Circuit Court of Appeals:

"The Burke Construction Company brought an action at law against Kline and others in the United States District Court for the Western District of Arkansas. The jurisdiction of that Court was invoked, upon the ground of diversity of citizenship. The action was for a breach of contract, whereby the Construction Company had engaged to pave certain streets in Texarkana, and a trial was had which resulted in a mistrial.

"Subsequently to the commencement of the foregoing action, Kline and others instituted a suit in equity against Burke Construction Company in a State Chancery Court of the State of Arkansas, upon the same contract, joining as defendants the sureties on the bond which Burke Construction Company had given for faithful performance of the contract. The bill in the latter suit alleged that the Construction Company had abandoned its contract and judgment was sought against the sureties as well as against the Burke Company. In the action brought by the Burke Company, Kline and others filed an answer and cross complaint. In the equity suit, Burke filed an answer and cross complaint. Thus the two cases presented substantially the same issues, the only difference being that resulting from the addition of the sureties as parties defendant in the equity suit. Both actions were in personam. The equity suit was removed to the United States Court upon the petition of the Burke Company on the ground of diversity of citizenship and upon the further ground that the question involved was a Federal question. Kline and others moved to remand. The District Court sustained the motion, and the equity suit was thereupon remanded to the State Court.

"After a mistrial of the action at law in the United States Court, the Burke Company filed a bill of complaint as a dependent bill to its action at law, by which it sought to enjoin Kline and others from further prosecuting the suit in equity in the State Chancery Court.

"The United States District Court denied the injunction and an appeal was taken to the Circuit Court of Appeals for the Eighth Circuit. That Court reversed the decision of the District Court and remanded the case with instructions to issue an injunction against the prosecution of the suit in equity in the State Court. From that decree, the case came to the Supreme Court upon writ of certiorari. The Supreme Court reversed the decree of the Circuit Court of Appeals.

"In other words, the Supreme Court held that the District Court was right in having denied the injunction. The Supreme Court decided that the District Court was right in refusing to enjoin Kline and others from further prosecuting their suit in the State Court. The reasons which prompted the Supreme Court so to hold are important here. Those reasons are shown at page 235 of the official opinion, page 83 of 43 Supreme Court Reporter, as follows:

"'The well established rule, to which we have referred, that where the action is one in rem, that Court—whether State or Federal—which first acquired the jurisdiction, draws to itself the exclusive authority to control and dispose of the res, involves the conclusion that the rights of the litigants to invoke the jurisdiction of the respective Courts are of equal rank . . . The rank and authority of the courts are equal, but both Courts cannot possess or control the same thing at the same time, and any attempt to

do so would result in unseemly conflict. The rule, therefore, that the Court first acquiring jurisdiction, shall proceed without interference from a Court of the other jurisdiction is a rule of right and of law based upon necessity, and where the necessity, actual or potential, does not exist, the rule does not apply. Since that necessity does exist in actions in rem, and does not in actions in personam, involving questions of personal liability only, the rule applies in the former, but does not apply in the latter.'

"Let us apply that language to the facts of the case at bar.

"There is no res in the possession of either Court (except as the lease may give possession). The action in the State Court was not an action in rem. It was purely an action in personam. While the petition in the State Court action did not seek any money judgment in personam, against the officers and Directors of the South Western, it did seek a decree which would control their personal and official actions. The res—the physical properties of the South Western Rail Road—were not and are not in the possession or control of either Court, State or Federal.

"The question which remained to be adjudicated after the stockholders' meeting of March 28 had been held, was simply this: Have the officers and Directors of the South Western Rail Road the right to sell its properties upon a mere majority vote of its stockholders? The action was one in personam, and not one in rem, and no necessity, actual or potential, exists which requires the application of an injunction by a Federal Court to protect any res in its possession or control. Neither the South Western Railroad Company, nor its officers, nor its Directors, nor its stockholders, are in the possession or control of the Dis-

trict Court of the United States for the Southern District of Georgia."

In Farmers Loan & Trust Company v. Lake Street Elevated R. Co., 177 U. S. 51, the res was the property of The Lake Street Elevated Railroad Company. There were two conflicting mortgage foreclosures as to this physical property.

In Lion Bonding and Surety Company v. Karatz, 262 U. S. 77, 43 S. Ct. 480, the res was the property of Lion Bonding and Surety Company. In the opinion in the Toucey case, supra, the Court referred to pages 88 and 89 of this opinion. The language there is:

> "Where a Court of competent jurisdiction has, by appropriate proceedings, **taken property into its possession** through its officers, the property is thereby withdrawn from the jurisdiction of all other courts. Wabash Railroad v. Adelbert College, 208 U. S. 38, 54, 28 Sup. Ct. 182 . . . Compare Oklahoma v. Texas, 258 U. S. 574, 581 . . . Possession of the res disables other Courts of coordinate jurisdiction from exercising any power over it. Farmers Loan & Trust Company v. Lake Street Elevated R. R. Co., 177 U. S. 51, 61 . . . The Court which first acquired jurisdiction through **possession of the property** is vested, where it holds possession, with the power to hear and determine all controversies relating thereto. It has the right, while continuing to exercise its prior jurisdiction, to determine for itself how far it will permit any other Court to interfere with such possession and jurisdiction. Palmer v. Texas, 212 U. S. 118, 126 . . ." (Emphasis ours.)

So in all cases cited by the Court in the opinion in the Toucey case in support of **"the res exception"** there was

tangible physical property in the prior possession of the Court held to have prior jurisdiction.

At page 22 of the opinion in the case at bar the dissenting Judge stated:

> "He (the District Judge) said, with complete clarity, too, that under the controlling decisions of the Supreme Court of the United States, the res of which the Reorganization Court has exclusive jurisdiction is not merely, or even mainly, the physical properties of the debtor railroad. It is the **proceeding for its reorganization,** including all claims, issues and controversies affecting or relating to **the plan of reorganization, the prime res in the proceeding,** its formulation, acceptance and carrying out."

The Court, in its majority opinion, did not, as we read its opinion, hold that the res was "the physical properties of the debtor railroad." The physical properties which the plan authorized the debtor railroad to acquire, if it could, were those of the South Western Rail Road. As we read the majority opinion, it decided the res to be "the incorporeal reversionary interest of the (its) lessor, which arose by operation of law when the leasehold was carved out of the fee-simple title" (Opinion, page 9). It decided the res to be reversionary interest necessary to be acquired by the debtor in order for the debtor to acquire legally the full fee-simple title to properties leased to the debtor by the South Western Rail Road. This reversionary interest was not in the possession of the Bankruptcy Court. The fee-simple title to the properties of the South Western was not in the possession of the Bankruptcy Court. The physical properties of the South Western were not in the possession of the Bankruptcy Court except in so far as the lease gave it possession. The Bankruptcy Court had possession of a leasehold interest in the properties, **not** the properties; **not**

the fee-simple title to the properties, **not** the reversionary interest in the properties which, plus the leasehold, makes up the fee-simple title. We respectfully submit that the dissenting opinion totally overlooks the fact that "the *res* exception" is based on the prior possession by the Federal Court of **physical property**.

As we read the majority opinion of the Circuit Court of Appeals, it went no further than to hold that the State Court had jurisdiction to determine the controversy. It did not deal with the questions of law at issue before the State Court at the time of the Federal Court injunction, the principal one of which was: COULD THE SOUTH WESTERN ACCEPT THE OFFER MADE IN THE PLAN BY A MERE MAJORITY VOTE OF ITS STOCKHOLDERS?

The dissenting opinion (R., page 194) states as what it considered the third question to be: "Was the District Judge right in deciding that unanimous consent of South Western's stockholders was not necessary, that majority consent was sufficient?"

The only answer the dissenting opinion makes to that question is in the last few lines thereof, where, without any citation of authority whatsoever, the dissenting Judge stated that the determination of the Federal Court favorable to the acceptance of the plan was right (R., page 204). There was no citation of authority, although the **State Court Judge** had determined this question of State law to the contrary.

We cannot conceive how this question can possibly be before this Court at this stage of the case. Nevertheless, we summarize briefly what we have said about it in the Courts below:

1. The charter of the South Western Rail Road Company, granted by the General Assembly of Georgia, is a

contract between the State and the Company, and between the State and the stockholders of the Company.

2. The obligations of that contract cannot be impaired by subsequent legislation (Dartmouth College case, 4 Wheat. 518, 4 L. Ed. 629).

3. Laws which subsist at the time and place of making a contract, enter into and form a part of it as if they were expressly incorporated in the contract. The obligation of a contract is measured by the standard of the laws in force at the time it was entered into. Its performance is to be regulated by the terms and rules which they prescribe (12 American Jurisprudence, page 14, Constitutional Law, Section 386, citing many Supreme Court cases, among others; W. B. Worthen Co. v. Kavanaugh, 295 U. S. 56, 55 Sup. Ct. 55, holding:

> "To know the obligation of a contract, we look to the laws in force at its making" [295 U. S., at page 60]).

4. As the law of Georgia stood in 1845:

> "A railroad corporation cannot, without special authority of statute, alienate its franchise or property acquired under the right of eminent domain, or essential to the performance of its duty to the public, whether by sale, mortgage, or lease."
>
> Singleton v. South Western Railroad, 70 Ga. 464.

5. The Act of 1933 (Code of 1933, Sections 94-328, 94-329, App. to petition, page 6) permitted the South Western **only so far as the State of Georgia** was concerned to alienate its properties. It did not affect the contractual rights of the stockholders under the charter.

> Mayor etc. of Knoxville v. Knoxville & O. R. Co., 22 Fed. 758 (appeal dismissed 136 U. S. 642);
> Alexander v. A. & W. P. R. Co., 108 Ga. 151.

6. The latter case is decisive of the question of State law controlling here, was so held to be by the State Court Judge and it and his decision are binding on the Federal Courts.

Erie R. Co. v. Tompkins, 304 U. S. 64, 58 Sup. Ct. 817;

Ruhlin et al. v. New York Life Ins. Co., 304 U. S. 202, 58 Sup. Ct. 860;

Fidelity Union Trust Co. et al. v. Field, 311 U. S. 169, 61 Sup. Ct. 176, holding:

> An intermediate State Court, in declaring and applying the State law, is acting as an organ of the State, and its determination, in absence of more convincing evidence of what State law is, should be followed by a Federal Court in deciding a State question.

Huron Holding Corporation et al. v. Lincoln Mine Operating Company, 312 U. S. 183, 61 Sup. Ct. 513, holding:

> In determining what is the law of a State, Federal Court may look to decisions of lower State Court as well as those of highest Court of State.

7. An analysis of Alexander v. A. & W. P. R. Co., 108 Ga. 151:

(a) The charter of the Atlanta and West Point R. R. Co. consisted of special Acts of the General Assembly of Georgia, enacted prior to the passage of the General Railroad Incorporation Law;

(b) Under its charter, the A. & W. P. had no authority to build a belt railroad from any point on its road to any other railroad;

(c) The General Railroad Incorporation Law was enacted, which provided that any railroad company theretofore created might, when "authorized by proper corporate action", amend its charter so as to acquire the corporate powers embraced in the general law, which included the right to build the branch railroad in question;

(d) The A. & W. P. sought so to amend its charter. This action was authorized only by a majority of the stockholders and not by unanimous consent;

(e) A number of the minority stockholders of A. & W. P. filed an equitable petition to enjoin the building of this belt or branch line as authorized by the amendment to the charter;

(f) The application for the amendment was a "mere nullity" (h. n. 3), having been based on the resolution of a mere majority of the stockholders which was not "proper corporate action" (h. n. 2);

(g) The building of the line was enjoined.

8. The controlling parallel of the Alexander case to the case as decided by the State Court Judge is:

(a) The charter of South Western consisted of special Act of the General Assembly of Georgia enacted prior to the passage of the General Railroad Incorporation Law;

(b) Under this charter the South Western had no authority to sell its railroad properties (Singleton v. South Western, 70 Ga. 464 [2]);

(c) An Act of the General Assembly of Georgia was enacted in 1933 (Code of 1933, Sections 94-328, 329) which **authorized** a railroad corporation under certain conditions to sell or lease its property, rights, and franchises, upon such terms as may be agreed upon by the Board of Directors and assented to by the holders of a majority of the stock;

powers, a Court of Equity will require a strong case of mismanagement or fraud before it will interfere with the internal management of affairs of a corporation" (Code of 1933, Section 22-710).

The State Court Judge, in his order granting the interlocutory injunction, denied the relief sought in so far as it was based on the ground of alleged mismanagement (R., page 21), but despite this denial by the Judge of the interlocutory injunction based on this ground, we are entitled under the Georgia law to a trial by jury on this issue of fact, provided that, in the opinion of the Courts, there is sufficient evidence of mismanagement to raise a question of fact.

> "On the hearing of an application for an interlocutory injunction, the Judge should not undertake to finally adjudicate disputed issues of fact, but should only determine whether the same authorizes the interlocutory relief sought."
>
> **City of Waycross et al. v. Waycross Savings and Trust Company et al., 146 Ga. 68 (3);**
> **Florida Central Railroad Company v. Cherokee Sawmill, 137 Ga. 815 (6).**

Under the Georgia law, the Judge of the Superior Court having jurisdiction of the person of the defendant, may decide whether or not an interlocutory injunction shall be granted. Whether or not a permanent injunction shall be granted is determined after a jury has passed on questions of fact.

Bono and Brother v. Orolow, 147 Ga. 388.

We respectfully submit that questions regarding the internal management of the affairs of a corporation created by a State should be determined by the Courts of that State. This is true the most particularly in the light of

the allegation of the petition in the State Court (R., page 110): "Petitioner is advised and so charges that the present management of the Central of Georgia Railway has, for the last week, had out over Georgia representatives actively soliciting votes for the ratification of the plan."

The effect of this allegation and any proof that might be submitted in connection with it, has not yet been passed upon by a jury in the State Court.

With respect to it, the Federal District Court said, in its finding of fact No. 25:

> "With reference to the contention that Samuel L. Varnedoe, a stock and bond broker, solicited proxies for 6,269 shares of South Western stock, which were voted in favor of the acceptance of the plan at the meeting of stockholders of March 28, 1947, and that it was illegal to solicit proxies, and that if these solicited proxies were thrown out, a majority of stockholders would not have voted for the acceptance of the plan; it appears from the undisputed evidence that proxies for 4,990 shares of stock out of the 6,269 shares were not solicited by Mr. Varnedoe; that the holders of these 4,990 shares were all clients of his to whom he had sold the stock, and that they voluntarily and of their own motion requested him to represent their stock. He admitted that the proxies for the other 1,279 shares of stock had been solicited by him" (R., page 54).

In the conclusions of law in the Federal Court, the District Judge concluded with respect to this feature:

> "It is claimed in the answer of the respondent that of the 30,137 shares of stock which were voted at the meeting of South Western stockholders, that 6,269 shares were solicited by Samuel L. Varnedoe, a broker,

and that the solicitation of proxies from stockholders was unlawful, and if these shares which were unlawfully solicited are thrown out, that there would have been voted for the acceptance of the plan only 23,868 shares, which is short of a majority of the total number of shares of stock. The only law which was cited to the Court which bore upon this question is sub-section (p) of Section 77 of the Bankruptcy Act, but this Section of the Bankruptcy Act only prohibits the solicitation of proxies from any creditors or shareholders of the debtors. We do not think that there is anything in this statute which prohibits the solicitation of proxies from the shareholders of the South Western Railroad Company. The plan was not submitted by the Commission to the stockholders of the South Western to be voted on. It was submitted to the South Western Company itself, and the Directors of the South Western resolved to accept the plan, subject to the assent of a majority of their stockholders. The only prohibition against soliciting proxies is from the shareholders of the debtor. Although the South Western may be technically a creditor, its stockholders are not creditors of the debtor within sub-section (p) of Section 77; the stockholders are not agents of the Corporation, do not own the property of the Corporation, cannot contract on its behalf, are not liable for its debts, and there is no relation of debtor and creditor and the stockholders are wholly distinct from the Corporation. Cook on Stockholders, Sections 267, 271 and 709. Moreover, Mr. Varnedoe testified, and his testimony is undisputed, that of the 6,269 shares voted by him as proxy, 4,990 shares of stock which he voted as proxy were not solicited by him at all, but that as he was a large dealer in this stock and had sold a large amount of it to his clients, that when the time came to vote

on the plan they consulted him and asked his advice and requested him to vote for their stock for them. The balance of 1,279 shares of stock which he voted was solicited by him" .(Conclusion of Law No. 22, R., pages 68-9).

As we read the decision of the Circuit Court of Appeals, this question was not there passed upon.

In the District Court, in conclusion of law No. 3, the Court said:

> "South Western is a party to the re-organization proceedings and to the plan for all purposes connected with the plan" (R., page 56).

Despite this conclusion, the District Court, in conclusion of law No. 22 (R., page 68), refused to condemn the solicitation of proxies from shareholders of the South Western, saying that sub-Section (p) of Section 77 of the Bankruptcy Act only prohibits the solicitation of proxies from any creditors or shareholders of the debtor.

Part of sub-Section (p) of 77 appears in the Appendix to this brief.

We respectfully submit that the judgment of the Circuit Court of Appeals should be affirmed, in order that all these questions may be threshed out in the State Courts of Georgia.

Respectfully submitted,

CHARLES J. BLOCH,
ELLSWORTH HALL, JR.,
614-18 Persons Building,
Macon, Georgia,
Counsel for Respondents.

APPENDIX.

U. S. C. A., Title 11, Section 205 (p).

(p) It shall be unlawful for any person, during the pendency of proceedings under this section or of receivership proceedings against a railroad corporation in any State or Federal Court, (a) to solicit, or permit the use of his name to solicit, from any creditor or shareholder of any railroad corporation by or against whom such proceedings have been instituted, any proxy or authorization to represent any such creditor or shareholder in such proceedings or in any matters relating to such proceedings, or to vote on his behalf for or against, or to consent to or reject any plan of reorganization proposed in connection with such proceedings; or (b) to use, employ, or act under or pursuant to any such proxy or authorization from any such creditor or shareholder which has been solicited or obtained prior to the institution of such proceedings; or (c) to solicit the deposit by any such creditor, or shareholder, of his claim against or interest in such railroad corporation, or any instrument evidencing the same, under any agreement authorizing anyone other than such depositor to represent such depositor in such proceedings or in any matters relating to such proceedings, including any matters relating to the deposited security or claim; or to vote such claim or interest or to consent to or reject any such plan of reorganization; or (d) to use, employ, or act under or pursuant to any such agreement with such depositor which has been solicited or obtained prior to the institution of such proceedings; unless and until, upon proper application by any person proposing to make such solicitation or to use, employ, or act under or pursuant to such proxies, authorizations, or deposit agreements, and after consideration of the terms and conditions (including

provisions governing the compensation and expenses to be received by the applicant, its agents and attorneys, for their services) upon which it is proposed to make such solicitation or to use, employ, or act under or pursuant to such proxies, authorizations, or deposit agreements, the Commission after hearing by order authorizes such solicitation, use, employment, or action, . . .